# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1890.**

No. ~~1486~~. 423 560 305

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, PLAINTIFF IN ERROR,

*vs.*

WALTER A. CUNNINGHAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

**FILED OCTOBER 20, 1890.**

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1 UNITED STATES OF AMERICA, } ss:
*Western District of Michigan,* }

The Circuit Court of the United States for the Northern Division of the Western District of Michigan, of the —— Term, A. D. 188–.

The Lake Superior Ship Canal, Railway and Iron Company, which is a corporation of the State of Michigan, plaintiff in this suit, which said corporation is a citizen of the State of Michigan, by Ball & Hanscom, its attorneys, complains of Walter Cunningham, who is a citizen of the State of Michigan, defendant, filing this declaration as commencement of suit, which is a suit arising under the laws of the United States:

For that whereas the said plaintiff heretofore, to wit, on the first day of July, in the year one thousand eight hundred and eighty-eight, was possessed of certain lands and premises situate in the county of Iron, in the State of Michigan, and the northern division of the western district of Michigan, known and described as follows—that is to say, the southwest quarter of section twenty-five, in township forty-four north, of range thirty-six west, of the value of fifty-one hundred dollars; which said land and premises the said plaintiff claims in fee under a grant from the United States, to wit, the act of Congress approved July 3rd, 1866, entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw county, Lake Superior, in said State," and under the selection and certification of said lands by the proper officers of the United States in accordance with said act.

And the said plaintiff being so possessed thereof, the said defendant afterward, to wit, on the first day of July, in the year one thousand eight hundred and eighty-eight, entered into the said premises and ejected the said plaintiff therefrom, and unlawfully withholds from the said plaintiff the possession thereof; and the said defendant claims the right to hold said lands under the pre-emption laws of the United States, and that the said grant was void so far as relates to said lands; that the said act did not operate thereon; and the determination of this suit depends upon the construction of said act of Congress, which is the question in controversy therein.

To the damage of the said plaintiff of five thousand dollars, and therefore it brings suit, etc.

BALL & HANSCOM,
*Attorneys for Plaintiff.*

2 [Endorsed:] No. 220. United States circuit court, western district of Michigan, northern division. Lake Superior Ship Canal, Railway and Iron Company *v.* Walter Cunningham. *Narr.* To the within-named defendant: Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of this suit a rule was entered in the book of common rules kept by the clerk of said court in his office, in the city of

Marquette, in the county of Marquette, in said district, requiring you to plead to said declaration within twenty days after the service upon you of a copy thereof and notice of said rule, or judgment, etc. Yours, etc., Ball & Hanscom, attorneys for pl'ff. Dated July 17, 1888. Filed July 17, 1888. F. M. Moore, dep. clerk.

3 In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER CUNNINGHAM.
} No. 220.

On filing declaration in this cause as commencement of suit and on motion of Ball & Hanscom, attorneys for plaintiff, ordered that defendant appear and plead to said declaration within twenty days after service upon him of a copy thereof and notice of this rule, or judgment, &c.

Dated July 17, 1888

BALL AND HANSCOM,
*Att'ys for Plaintiff*

4 UNITED STATES OF AMERICA,
*Western District of Michigan,* } *ss:*

The Circuit Court of the United States for the Northern Division of the Western District of Michigan, of the ——Term, A. D. 188–.

The Lake Superior Ship Canal, Railway and Iron Company, which is a corporation of the State of Michigan, plaintiff in this suit, which said corporation is a citizen of the State of Michigan, by Ball & Hanscom, its attorneys, complains of Walter Cunningham, who is a citizen of the State of Michigan, defendant, filing this declaration as commencement of suit, which is a suit arising under the laws of the United States:

For that whereas the said plaintiff heretofore, to wit, on the first day of July, in the year one thousand eight hundred and eighty-eight, was possessed of certain lands and premises situated in the county of Iron, in the State of Michigan, and the northern division of the western district of Michigan, known and described as follows—that is to say, the southwest quarter of section twenty-five, in township forth-four north, of range thirty-six west, of the value of fifty-one hundred dollars; which said land and premises the said plaintiff claims in fee under a grant from the United States, to wit, the act of Congress approved July 3rd, 1866, entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw county, Lake Superior, in said State," and under the selection and certification of said lands by the proper officers of the United States in accordance with said act.

And the said plaintiff being so possessed thereof, the said defend-

ant afterward, to wit, on the first day of July, in the year one thousand eight hundred and eighty-eight, entered into the said premises and ejected the said plaintiff therefrom, and unlawfully withholds from the said plaintiff the possession thereof; and the said defendant claims the right to hold said lands under the pre-emption laws of the United States, and that the said grant was void so far as relates to said lands; that the said act did not operate thereon; and the determination of this suit depends upon the construction of said act of Congress, which is the question in controversy therein.

To the damage of the said plaintiff of five thousand dollars, and therefore it brings suit, etc.

BALL & HANSCOM,
*Attorneys for Plaintiff.*

5 [Endorsed:] Copy. No. 220. United States circuit court, western district of Michigan, northern division. Lake Superior Ship Canal, Railway and Iron Company *v.* Walter Cunningham. *Narr.* To the within-named defendant: Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of this suit a rule was entered in the book of common rules kept by the clerk of said court in his office, in the city of Marquette, in the county of Marquette, in said district, requiring you to plead to said declaration within twenty days after the service upon you of a copy thereof and notice of said rule, or judgment, etc. Yours, etc., Ball & Hanscom, attorneys for pl'ff. Dated July 17, 1888. Filed Aug. 15, 1888. F. M. Moore, dep. clerk.

STATE OF MICHIGAN,
*County of Marquette, Western District of Michigan,* } *ss:*

Jacob Dolf, of said county, being duly sworn, deposes and says that on the 23d day of July, A. D. 1888, he served the declaration, of which the within is a true copy, on Walter Cunningham, the defendant named in said declaration, by delivering to said defendant, Walter Cunningham, at the house of Lyman Carter, on section twenty-five, in township forty-four north, of range thirty-six west, in the county of Iron, in the State of Michigan, a true copy thereof, together with a true copy of the notice to appear and plead endorsed thereon, as hereon endorsed.

JACOB DOLF.

Subscribed and sworn to before me this 31st day of July, A. D. 1888.

RICHARD BLAKE,
*Notary Public in and for said County.*

6 LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON COMPANY *vs.* WALTER CUNNINGHAM. } August 15, 1888.

On reading and filing an affidavit of due personal service upon the defendant of a copy of the declaration filed pursuant to statute

in this cause thereon, and on motion of Ball & Hanscom, attorneys for plaintiff, ordered that the defendant's appearance and his default in not pleading be, and the same is hereby, entered.

BALL & HANSCOM,
*Att'ys for Plaintiff.*

F. M. MOORE, *Dep. Clerk.*

7 (*Default Absolute.*)

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER CUNNINGHAM.
} Ejectment.

The appearance of the defendant and his default in not pleading in this cause having been heretofore duly entered and four full days in term having elapsed since the entry of said default, no motion having been made on the part of the defendant to open the same, on motion of Messrs. Ball and Hanscom, attorneys for the plaintiff, it is ordered that said default be, and is hereby, made absolute; that interlocutory judgment be, and is hereby, entered therein, and that the plaintiff's damage be assessed by the court.

Dated November 17, 1888.

BALL & HANSCOM,
*Attorneys for Plaintiff.*

F. M. MOORE, *Dep. Clerk.*

8 At an adjourned session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, began and held at the United States court-rooms, in the city of Marquette, in said division and district, on Saturday, November 17th, A. D. one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Present: Hon. Henry F. Severens, U. S. dist. judge.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER CUNNINGHAM.
} Ejectment.

The appearance of the defendant in this cause and his default in not pleading having been duly entered and the said default having become absolute, whereby the said plaintiff remains therein undefended against the said defendant; wherefore the said plaintiff ought to recover against the said defendant the possession of the premises described in the plaintiff's declaration in this cause as the southwest quarter of section twenty-five, in town. forty-four north, of range thirty-six west, in the county of Iron, in said northern division of

said western district, and to hold the same in fee: Therefore it is considered that the said plaintiff do recover against the said defendant the possession of the premises aforesaid, and that he have a writ of possession according to the force, form, and effect of his said recovery; and it is further considered that the said plaintiff do recover against the said defendant his costs and charges by it about its suit in this behalf expended, to be taxed, and that the said plaintiff have execution thereof.

9 Copy.

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON CO., Plaintiff,
*vs.*
WALTER A. CUNNINGHAM, Defendant.

*Affidavit as Basis of Motion for New Trial and Stay of Proceedings.*

Vosper Bros., attorneys for def't.

Filed April 19, 1889.

F. M. MOORE, *Dep. Clerk.*

10 The Circuit Court *for* the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON CO., Plaintiff,
*vs.*
WALTER A. CUNNINGHAM, Defendant.

STATE OF MICHIGAN, } *ss:*
*County of Iron,* }

Walter A. Cunningham, being duly sworn, upon his oath says that he is the defendant in the above-entitled cause; that he has been in actual occupation of the premises described in plaintiff's declaration since prior to May 1st, 1888.

That on the first day of May, 1888, this affiant had a *bona fide* homestead claim upon said premises; that such a claim arose and was asserted by the actual occupation of said premises by this defendant under color of the laws of the United States, and that this defendant, by age and citizenship, is duly qualified to make and assert such claim.

That this action was commenced July 17, '88.

That at same time said plaintiff commenced in this court several other suits against as many other defendants; that the claim of the plaintiff and the rights of the defendants in each of said suits were supposed by this and the other defendants to be practically
11 the same, and that a decision in any one case would be practically a decision of them all; that this affiant, being then, as now, desirous of defending his possession of and claim to said

tract, joined with several other such defendants and raised $100 to employ and retain counsel to defend said actions; that one Geo. M. Buckley, of Iron River, was conversant with the legislation, State and national, affecting said premises, as well as of the acts of this and the other defendants upon the premises claimed respectively by each such defendants; that, as each of these defendants were poor and the expenses attending a trip to Marquette quite considerable, it was deemed by this and the other defendants better to send said Buckley to Marquette with authority to engage some competent attorney to defend this and the other suits; whereupon said Buckley undertook the performance of the trust, and there was paid over to him the $100 so raised, to be by him expended in the retaining of some competent attorney to defend this and the other suits.

That some time in August, and long prior to the default entered herein, the said Buckley, in apparent fulfillment of his trust, went to Marquette, and, after being absent some days, returned and reported to this and the other defendants that he had retained one E. J. Mapes, an attorney of Marquette, Michigan, to defend this suit, as well as those of the other defendants; that he had made a full statement of all the facts in this and the other cases to said attorney; that he was advised by said attorney that he could obtain judgment for this defendant and the other defendants in said actions, and that he would do all things necessary to fully protect this defendant and the other defendants in the premises.

12 That said Buckley further reported said Mapes as saying that said plaintiff would not, in case of contest, bring any of said cases to trial, as plaintiff well knew that it had no valid title to the premises claimed in this and the other suits.

That upon receiving such report, and fully believing the same to be true, and in the confidence that his rights and claim to said land *was* being zealously guarded by the said E. J. Mapes as the attorney for this defendant, this affiant rested easy and made no further or other attempt to defend said action, believing that every necessary thing to protect this defendant in his claims to said land was being done by the said Mapes conformably to the rules and practice of said court.

That on or about the 26th day of March last the marshal of said district demanded from this affiant the immediate possession of said premises under and by virtue of a writ of restitution issued upon a judgment rendered by default in said action; that such demand was the first intimation this affiant had received that a judgment had been rendered in said action or that a default had been entered against him therein, and was also the first intimation he had received that the said Mapes was not defending said action in the interest of this affiant; that this affiant is informed and believes and so states the fact to be that the said plaintiff, well knowing it had no legal title to said premises nor any such title as would authorize or secure a judgment in its favor in either the State or Federal courts in case of a contest, has repeatedly petitioned Congress for legislation legalizing its selection of said lands and confirming its claim

thereto, but Congress has as often refused so to do, but instead thereof did pass an act, approved March 2d, 1889, confirming the
13 right and claim of this affiant to said premises, as he is advised by his counsel in this case, which information he believes to be true. This affiant further states that he has heretofore fully and fairly stated all the facts in this case to James K. Reddington, an attorney of the city of Washington, who has had an extensive practice before the Department of the Interior and committees in Congress in matters involving and affecting what are known as the land grants of the Upper Peninsula, and particularly the pretended claim of plaintiff to the lands mentioned in the declaration and writ of restitution herein, and through the forfeiture of one of which grants and the laws of Congress this defendant claims vested rights in said premises.

That by reason of such practice and the investigation incident thereto the said Reddington is pre-eminently qualified to give a legal opinion as to the force and validity of the claim of said plaintiff to the premises involved in said action, and that after such statement as aforesaid this affiant was advised by the said Reddington that the plaintiff had no enforceable title or claim to said land; that its pretended selection thereof was a nullity; that it never had and without further legislation by Congress never could obtain a patent for said lands, and that said lands were a part of the public domain and subject to be appropriated only under the homestead and pre-emption laws of the United States, which information this affiant believes to be true; that the said Reddington acted as counsel for this defendant in resisting the confirmatory legislation asked and sought by plaintiff from Congress; that prior to receiving this advice this affiant had fully and fairly stated to said Reddington all his acts upon and claims in respect to said lands.

14 That this affiant has also fully and fairly stated to Benjamin Vosper, one of the firm of Vosper Brothers, attorneys, residing in the city of Ionia, and his counsel herein, all the facts in relation to his settlement upon, occupation of, and assertion of claim to said land under the homestead laws of the United States, by virtue of which affiant claims vested rights in said land, and that after such statement made as aforesaid he was advised by his said counsel that he had a good and substantial defense to said action upon the merits thereof; that said lands were a part of the public domain at the time this affiant first settled upon and occupied the same, clouded only by a colorable title of the Ontonagon & Brule River Railroad Company thereto; that said railroad company had forfeited their right to the same, and that it only required a declaration by Congress of the fact of such forfeiture to absolutely remove the colorable claim of said road; that the lands were never subject to selection by the plaintiff or the State of Michigan for its use, and that upon the passage of the act relating to said lands, approved March 2nd, 1889, the previously asserted claim of this defendant became absolute in fact, as well as by the express terms of the act itself, which information this affiant also believes to be true.

Affiant further states that the rights of the parties hereto by reason

of the conflicting claims of the respective parties could not be satisfactorily ascertained or established in the *ex parte* proceedings under which judgment was obtained in this cause; that under the proceedings had herein the court did not undertake to judicially determine the rights of the respective parties, and this defendant most humbly submits that when the fact appears that this defendant is in possession of the premises claiming under the homestead or pre-emption laws of the United States, and that he was in such occupation May 1st last, he should not be barred by an *ex parte* proceeding of which he had no notice, but should be awarded a trial upon the merits in order that his rights may be ascertained and adjudicated by this honorable court.

Affiant further states that the judgment was rendered in said cause November 17, 1888, and that a writ of restitution was issued thereon February 7, 1889, returnable May 7, 1889; that the marshal of said district now has such writ in his possession and threatens to immediately execute the same and thereby evict this defendant from said premises.

This defendant asks that said judgment may be vacated and a new trial granted, and that pending the decision upon such application for a new trial that all proceedings under said judgment may be stayed by the order of this honorable court.

WALTER A. CUNNINGHAM.

Sworn to and subscribed before me this 17th day of April, A. D. 1889.

YOUNG CAMPBELL,
*Justice of the Peace.*

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON COMPANY, Plaintiff,
*vs.*
WALTER A. CUNNINGHAM, Defendant.

Now comes the said defendant, by Vosper Brothers, his attorneys, and moves the court now here that the default and judgment heretofore entered and rendered in said cause be vacated and set aside and a new trial granted said defendant for the following reasons:

1. Because said default and judgment are against the right and justice of the case.
2. Because said defendant has a good and substantial defense to said action upon the merits thereof.
3. Because said default and judgment were taken after said defendant honestly supposed a defense to said action had been interposed in his behalf by competent counsel retained by him.
4. Because said default and judgment were taken without the knowledge of said defendant and after said defendant had reason to believe and did believe that his rights were being guarded and protected by counsel retained in his behalf.

17 5. Because the rights of the parties in said cause could not be satisfactorily ascertained or established in the *ex parte* proceedings under which said judgment was obtained.

6. Because said defendant has at all times sought to have and should have an opportunity to substantiate and maintain his claim to the lands involved in said action and thereby have a judgment rendered in his favor upon the merits of the controversy.

This motion is founded upon the records and files in said cause and the affidavit of the defendant this day filed.

VOSPER BROS.,
*Attorneys for Defendant.*

Dated and entered April 19th, 1889.

F. M. MOORE, *Dep. Clerk.*

18 At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, began and held at the United States court-rooms, in the city of Marquette, in said district and division, on Tuesday, the sixteenth day of July, in the year one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred fourteenth.

Present: The Honorable Henry F. Severens and George R. Sage, district judges, the latter sitting pursuant to designation and appointment by the Honorable Howell E. Jackson, circuit judge.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER CUNNINGHAM. } No. 220.

In this cause, a motion for a new trial having been heretofore argued and taken by the court under advisement, upon due consideration of the premises, it is ordered by the court now here that the judgment heretofore entered in this cause be, and the same hereby is, vacated, set aside, and altogether held for naught, and that a new trial in this cause be, and the same hereby is, granted.

19 (*Plea.*)

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON COMPANY, Pl'ff,
*vs.*
WALTER A. CUNNINGHAM, Def't.

And now comes the said defendant, by Vosper Bros., his attorneys, and demands a trial of the matters set forth in said plaintiff's declaration.

VOSPER BROS.,
*Att'ys for Def't.*

Filed July 22nd, 1889.

F. M. MOORE, *Dep. Clerk.*

20 UNITED STATES OF AMERICA:

Adjourned May Term, A. D. 1889.

MONDAY, 22*nd Day of July, A. D.* 1889.

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, continued and held at the United States court-rooms, in the city of Marquette, in said district and division, on Monday, the twenty-second day of July, in the year one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

Present: Hon. H. F. Severens, U. S. dist. judge.

Present also: Hon. George R. Sage, U. S. dist. judge.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON COMPANY
*vs.*
WALTER CUNNINGHAM. } No. 220.

The parties in this cause being in court with their respective attorneys and ready for trial, thereupon came a jury, to wit, William Blackwood, John Milroy, Ole Walseth, George W. Williams, A. W. Bernier, John W. Jochim, George Brisbin, Michael Bresnahan, Fred. J. Eggar, Ira Carley, William J. C. Pearce, & Levi Bernier, good and lawful men, who, being duly empanneled, tried, and sworn well and truly to try the issue between the parties, sat together and heard the evidence this day adduced, and upon motion of the court, by and with consent of parties hereto, it is ordered that Silas W. Goodale be, and he hereby is, appointed reporter in this cause, and that a transcript of his stenographic notes shall constitute the
21 official record of the testimony taken in this cause.

Whereupon the court adjourned until July 23, 9 a. m.

UNITED STATES OF AMERICA:

Adjourned May Term, A. D. 1889.

TUESDAY, *July* 23, 1889.

Court met pursuant to adjournment.

Present: Hon. Henry F. Severens, U. S. dist. judge.

Present also: Hon. George R. Sage, U. S. dist. judge.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER CUNNINGHAM.

The jury heretofore duly empanneled, tried, and sworn in this cause sat together and heard the evidence this day adduced.

Court adjourned until 24th.

UNITED STATES OF AMERICA:

Adjourned May Term, A. D. 1889.

WEDNESDAY, *July* 24, 1889.

Court met pursuant to adjournment.
Present: Hon. Henry F. Severens, U. S. dist. judge.
Present also: Hon. George R. Sage, U. S. dist. judge.

22 THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY *vs.* WALTER CUNNINGHAM. } Ejectment.

The jury heretofore duly impannelled, tried, and sworn in this cause sat together and heard the conclusion of the evidence, the arguments of counsel, and the charge of the court, and by order of the court, and without *having* their panel, say upon their oath that they find the defendant, Walter Cunningham, is guilty of unlawfully withholding the lands and premises described in the plaintiff's declaration, and that the plaintiff is entitled to hold the same in fee as it hath alleged, and they assess the damages of the said plaintiff at the sum of six cents; and on motion of defendant's counsel it is ordered that all proceedings herein be stayed for thirty days to allow defendant to move for a new trial, and when said motion is decided, if decided adversely to defendant, said defendant of said motion to settle bill of exceptions.

23 (*Motion for New Trial.*)

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Pl'ff, *vs.* WALTER CUNNINGHAM, Def't. } In Ejectment.

And now comes the said defendant, by Messrs. Vosper Bros., his attorneys, and — the court now here to vacate and set aside the verdict and judgment heretofore rendered in said cause and to grant a new trial in said case for the following reasons:

1st. Because the court erred in directing the jury to return a verdict for the plaintiff.

2nd. Because said court erred in not directing the jury to return a verdict for the defendant. This motion is based upon the record and files in said cause and the evidence taken therein upon the trial of the same.

VOSPER BROS.,
*Attorneys for Defendant.*

Filed and entered Aug. 2, 1889.

F. M. MOORE,
*Deputy Clerk.*

24 (*Opinion, Jackson, Circuit Judge.*)

Circuit Court of the United States for the Western District of Michigan, Northern Division.

THE LAKE SUPERIOR SHIP CANAL, R. R. AND IRON COMPANY *vs.* WALTER CUNNINGHAM. } Pending on Motion of Defendant for New Trial.

From a careful examination of the record in this case, in the light of the able briefs submitted by counsel on both sides, the circuit judge has reached the following conclusions, viz :

1st. The act of Congress approved June 3rd, 1856, by its express terms contemplated and provided for the construction of several distinct and independent lines of railway. The grant was made to the State of Michigan "to aid in the construction of railroads." The lines of said railroads were designated, and among them was that from Ontonagon to the Wisconsin State line. The grant embraced "every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads." It was further provided "that the lands so to be located shall in no case be further than fifteen miles from the lines of said roads and selected for and on account of each of said roads," and the landsthus granted for the benefit of each of said roads were to "be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." It is further provided by the 3rd section of the act that the lands thus granted to said State should be subject to the disposal of the Legislature thereof for the purposes aforesaid and no other.

25 The manner of such disposition for each of said roads is prescribed by the 4th section of the act, and "if any of said roads is not completed within 10 years no further sales shall be made, and the lands unsold shall revert to the United States." The Legislature of Michigan in accepting said grant by the act approved Feb'y 14th, 1857, clearly recognized the purpose and intent of Congress to aid in the construction of separate and distinct lines of railroad. The benefits of the grant intended to aid in the construction of the railroad from Ontonagon to the Wisconsin State line were vested in or conferred upon "the Ontonagon and State Line Railroad Co.," organized under the laws of the State in 1856. In like manner the lands to be located along the other lines of road designated in the granting act were conferred upon other companies having a separate corporate existence from that of "the Ontonagon and State Line Railroad Co.," and by the 3rd section of the act "the lands, franchises, rights," &c., thus conferred upon and vested in said railroad companies or either of them were to be exclusively applied in the construction of their respective lines of railroad as designated, and were not to be applied to any other purpose what-

soever. Both by the granting act and the act of acceptance each of said railroads were to be public highways.

For each of said lines separate surveys and locations were made, separate maps therefor were filed in the Interior Department, separate selections of lands within the limits of the grant were made for each of the lines, separate approvals of such selections were made by the Secretary of the Interior for each of said railroads, and were separately certified by the Department to the State for the benefit of each respectively.

26 The trusts thus created by the United States as grantor and accepted by the State as trustee for specific and defined purposes and for designated objects were subject to the single condition subsequent that if any or either of said roads was not completed within ten years from June 3rd, 1856, the lands granted and appropriated to such line and remaining unsold should revert to the United States. Until the expiration of said period of ten years and the non-completion of the Ontonagon and State Line road no action of either State or United States officials or of both combined could change, modify, or alter the trust created and accepted for the construction of that particular line, nor could the lands assigned to that line and certified to the State for its construction be lawfully appropriated by such officials to the construction or benefit of any other line whatsoever. The trust declared and accepted required that they should be exclusively applied in the building and completion of that road and no other. To effect any other application or disposition of these lands would require the consent of the United States, expressed through Congress, and of the State, expressed through its Legislature, and of the railroad company on which said lands had been conferred or its successors or assigns in right. It is equally well settled that the United States alone could take advantage of the non-performance of said condition subsequent, and that so long as they failed or neglected to assert their right of forfeiture, even after condition broken, the trust created for the construction of the Ontonagon and Wisconsin State Line road would stand unimpaired, and the title to the lands granted and certified to the State for the benefit of that line would remain out of the United States and form no part of the public domain. It is also settled that, the grant being a public one, the reserved right of the United

27 States to reclaim these lands or to declare them forfeited for breach of the condition subsequent would have to be asserted either by judicial proceedings authorized by law or by some legislative assertion of ownership of the property for condition broken, such as an act of Congress directing the possession and appropriation of the land, or that it be offered for sale and settlement.

Schulenberg *et al. vs.* Harriman, 21 Wallace, p. 44.

In order that an act of Congress should work a reversion to the United States for condition broken of lands granted by them to a State to aid in internal improvements the legislation must directly, positively, and with freedom from all doubt and ambiguity manifest the intention of Congress to reassert title and resume possession.

St. Louis, I. M. & S. Railway Co. *vs.* McGee, 115 U. S., p. 469.

The United States prior to March 2nd, 1889, never by judicial proceedings authorized by law nor by legislative action asserted ownership of the lands in question or exercised its reserved right of forfeiture for condition broken in failing to complete the road. By the act of March 2nd, 1889, Congress declared certain lands granted to the State of Michigan for railroad purposes by the act of 1856 forfeited. This act confirmed certain rights, titles, and entries, but need not be specially noticed, as it is a matter of construction and grave debate whether its confirmatory provisions are most in favor of plaintiff or defendant. Both sides claim the benefit of its provisions. The act was not, however, passed upon by the trial judge, who directed a verdict for the plaintiff upon other grounds.

It is claimed for plaintiff that by the joint resolution of Congress adopted July 5th, 1862, the several trusts as above indicated
28 were changed with the acquiescence of the State and the companies interested, and that under the operation of that resolution the several railroads contemplated and provided for by the act of June 3rd, 1856, were abandoned and one consolidated system was established upon a new line from Marquette to a point on the Wisconsin State line near the mouth of the Menominee river.

The joint resolution of Congress does not upon its face admit of this construction, nor do the facts and circumstances which led to its adoption warrant the court in giving it any such strained interpretation. The language of the resolution relates to and only mentions the line of railroad from Marquette to the Wisconsin State line whose relocation alone was sought and applied for. The Peninsula R. R. Co., which sought the relocation of the line from Marquette to the Wisconsin State line so as to carry the road to a point near the mouth of the Menominee river, had no interest in or connection with the line of road from Ontonagon to the Wisconsin State line nor in the lands selected and certified to the State for the benefit of that line when said joint resolution of Congress was applied for and procured. Said Peninsula R. R. Co. had only succeeded to the rights, privileges, and franchises of the Marquette and State Line Railroad Co. A brief reference to the facts will make this clear. The Marquette and State Line Railroad Company first consolidated with the Chicago, St. Paul and Fond du Lac Railroad Co. This consolidated company subsequently, on March 27, 1857, consolidated with the Ontonagon and State Line railroad under the name of the Chicago, St. Paul and Fond du Lac R. R. Co., and, so far as such rights could be transferred or assigned, succeeded to all property, franchises, rights, and privileges which the Ontonagon and State Line Railroad Co. had acquired or could acquire under all or any acts of
29 Congress. The Chicago, St. Paul and Fond du Lac Co. was sold under mortgage in 1859, and its property, rights, franchises, &c., were purchased by the Chicago and Northwestern Railway Co. Having by this purchase succeeded to all the rights and interests of both the Marquette and State Line railroad and of the Ontonagon and State Line railroad in and to the granted trust lands (assuming that they were the subject of transfer and assignment by said two companies), the Chicago and Northwestern Railway Co., in

February, 1862, requested the Michigan board of control of railroad grants to confer upon the Peninsula R. R. Company all the benefits of the grant of 1856 which had been vested in the Marquette and State Line railroad. Said board of control, in compliance with said request and upon the application of said Peninsula R. R. Co., under the authority of an act of the Michigan Legislature approved March 4th, 1861, ordered that all the lands, franchises, rights, powers, and privileges which were or might be granted in pursuance of said act of Congress approved June 3rd, 1856, to aid in the construction of a railroad from Marquette to the Wisconsin State line "be, and the same are hereby, conferred upon the said Peninsula R. R. Co. under the regulations and restrictions of an act approved Feb'y 14, '57." The Peninsula R. R. Co. was organized for the purpose of constructing a railroad from Marquette to the Wisconsin State line at or near the mouth of the Menominee river, which route necessitated a change in and relocation of the line of the Marquette and State Line railroad as surveyed and located under the granting and accepting acts of 1856 and 1857. This change and relocation of said line was recommended to Congress by said board of control of railroad grants at the time of conferring upon said Peninsula R. R. Co. the benefits of the grant previously vested in the Marquette and State Line R. R. Co. This
30 proposed change and relocation of the Peninsula R. R. Co.'s line, after lands had been selected and certified in Dec., 1861, for the original line of the Marquette and State Line railroad, required the assent of both Congress and the State, because it involved a clear departure from the exclusive trust granted by the United States and accepted by the State under the acts of 1856 and 1857; hence the application to Congress for the joint resolution of July 5th, 1862, which related alone to the proposed change of the original line from Marquette to the Wisconsin State line, so as to permit a relocation thereof on the line of Peninsula R. R. Co.'s charter route. The joint resolution of Congress authorized this relocation of said line, and as an incident thereto operated as a new grant of lands to the State for the benefit of such new line upon releasing the lands previously selected and certified for the original line of road, with a certificate from the Governor of Michigan that all claim thereto by the State and said Peninsula R. R. Co. was surrendered, and that the same had never been pledged, sold, or in anywise encumbered. There had been selected for this original line from Marquette to the Wisconsin State line and duly certified to the State by the Interior Dep't in Dec., 1861, about 161,104 acres. This land the Peninsula R. R. Co., in May, 1863, released and surrendered to the United States under and in pursuance of said joint resolution of Congress of July 5, '62, and in consideration of the relocation of said land grant so as to conform to its new line. The State, by an act supplemental to the act of Feb'y 14, '57, acceded to said joint resolution of Congress and confirmed unto said Peninsula R. R. Co. the new grant of lands thereby provided for. Thus by the concurrent action of Congress, of the State, and of the Peninsula R. R. Co., as the suc-
31 cessor of the Marquette and State Line railroad, the trust

created by the act of 1856, in respect to the line of railroad from Marquette to the Wisconsin State line, was changed and made applicable to the relocated line of the Peninsula R. R. Co. This was the sole object of the resolution of 1862 and the sole change effected or alteration made in the trusts created and defined by the act of June 3, '56. When said resolution was procured for and accepted by the Peninsula R. R. Co. that company had no interest in and connection with the Ontonagon and State Line railroad, for the benefit of which there had been previously selected and certified to the State of clear lands 142,430.23 acres. The joint resolution of Congress did not expressly or by any fair implication call for or require the surrender of those lands, with which the Peninsula R. R. Co. had no connection and over which it could exercise no control. The joint resolution of Congress is fully satisfied by confining its operation and effect to a change in the original grant and trust merely to the extent of allowing the old line from Marquette to the Wisconsin State line to be abandoned upon the surrender of the lands already certified to that line and permitting a relocation of the same on the route of the Peninsula R. R. Co.'s line, to be run from Marquette to the Wisconsin State line at or near the mouth of the Menominee river. That this was the construction which the State of Michigan placed upon said resolution of 1862 is clearly shown by the joint resolution of the Legislature of said State passed in Feb'y, 1867, which is entitled "Joint resolution authorizing the Governor to execute the certificate of non-incumbrance and surrender of the lands on the original line of the Marquette and Wisconsin State Line railroad." Said resolution of the State Legislature, after reciting that by the act of Congress approved June 3, '56, there was made, among other grants to this State, a grant of lands to
32 aid in the construction of a railroad from Marquette to the Wisconsin State line; that by joint resolution of Congress a change in the route of said road was authorized and had been made; that the company had executed a release of the lands on the original line, provided "that the Governor be, and he is hereby, authorized to execute and file the certificates of inon-ncumbrance and surrender to the United States of the land on the original line of said railroad (from Marquette to the Wisconsin State line) required by said resolution" (of 1862).

After the Peninsula R. R. Co. consolidated with the Chicago and Northwestern Railway Co., in 1864, under the name of the latter, said Chicago and Northwestern Railway Co., under date of January 31, '68, released to the State of Michigan the clear lands on the Marquette and Wisconsin State line; and the Governor of said State, on the 1st May, 1868, under and in pursuance of the State resolution of 1867 and in compliance with the congressional resolution of 1862, released and surrendered the said lands to the United States. This release by the Governor was a full compliance with the requirements of both of said resolutions and exhausted the Governor's authority to deal with the subject of the granted lands. The Commissioner of the General Land Office subsequently, on July 13, '68, requested the Chicago and Northwestern Railway Co. to execute a similar re-

lease as to the 142,430.32 acres of clear lands previously selected and certified to the State in Dec., 1861, for and on account of the line from Ontonagon to the Wisconsin State line. This request was unauthorized by any fair construction of the congressional resolution of 1862, and the Governor of the State, in attempting to make the surrender of said lands in August, 1870, exceeded his authority, and his act was a nullity and did not divest the State of its title
33 thereto as trustee nor in any way defeat or annul the trust created by the act of 1856 in respect to said lands, which were exclusively appropriated by Congress to aid in the construction of the line of railroad from Ontonagon to the Michigan State line. The Commissioner of the Land Office certainly had no authority by virtue of his office or official duties to deal with the subject of that trust created by Congress. He derived no authority from the resolution of 1862 to either disturb or terminate the trust created and declared for that line or to recall the lands granted by the United States and certified in 1861 to the State for its construction. The congressional resolution of 1862 did not, in terms or by implication, confer upon the land department any jurisdiction whatever over the lands granted to the State to aid in the construction of this Ontonagon and Wisconsin State Line railroad, nor did the State resolution of 1867 confer upon the Governor any authority, even by the most strained implication, to release and surrender the same. The Governor of the State had no more authority under said resolutions of Congress and of the State, either or both, to surrender said 142,430.23 acres of land than he, as Governor, would have had to convey them, in defiance of the trust on which they were held by the State, to a private individual without consideration. The opinion of the att'y general, on which the Governor acted, does not assert the existence of his authority to surrender these lands. The att'y general was manifestly considering the lands relating to the old line from Marquette to the Wisconsin State line. He expressly disclaims any knowledge of the correctness of description of said lands, and states that "if any of them should prove incorrect I do not see how it could affect the State. In such case your certificate would be a simple nullity as being unauthorized by law," and at the close of his opinion he states that the
34 release to be executed would "only release the interests of the State to such lands as are contemplated by the acts of Congress approved June 3rd, 1856, July 5, '62, and March 3rd, 1865." It is perfectly clear that the att'y gen'l did not intend to advise the Governor that he had authority to release the lands on the Ontonagon and State Line road, nor did the release submitted for his consideration and opinion on its face purport to surrender the lands on that line of railroad. It appears that after the Peninsula R. R. Co. consolidated with the Chicago and Northwestern Railway Co. Congress, by an act approved March 3, '65, granted to the State of Michigan, for the purpose of aiding in the construction of a railroad from Marquette to the Wisconsin State line, at or near the mouth of the Menominee river, for the use and benefit of said Chicago and Northwestern Railway Co., four additional alternate

sections per mile to that already granted by said act of 1856 and the supplementary joint resolution of 1862; but this in no way affected the grants made for other lines by the act of 1856. Such grants and the trusts raised and declared to aid in the construction of the other railroads or lines designated in the granting act of Congress and the accepting act of the State remained wholly undisturbed and unaffected by either State or Congressional action when the Governor of Michigan, without authority of law, executed the certificate and surrender of said 142,430.23 acres of land. The Land Office had no authority of law either to call for or to accept said release for or on behalf of the United States. Congress, having made the grant and created the trust connected therewith, could alone determine when the land should revert and the trust terminate. The State and not the Governor thereof was the trustee, and the granting act defined how and in what manner the State as trustee, by and through its Legislature, should dispose of said lands. Looking to the purpose and object sought to be effected and to the language
35 of the joint resolution of 1862, it is perfectly clear that it was wholly insufficient under the rule laid down in St. Louis, I. M. & S. Railway Co. *vs.* McGee, 115 U. S., 469, to work a reversion to the United States even *in* "*futuro*" of the lands granted by the act of 1856 to aid in the construction of the Ontonagon line of railroad. That resolution neither directly, positively, nor beyond all doubt or ambiguity manifests the intention of Congress to reassert title and resume possession of said lands either at the time of its passage or at any future day. Neither did said resolution in any way authorize the land department to assert such title for the United States or to assume any control over said lands. I am therefore clearly of the opinion that, in the absence of any law, State or Federal, calling for or requiring the execution of the certificate and surrender made by the Governor on August 14, '70, his release of said 142,430.23 acres of land was void for want of authority, and that said release did not operate to revest the title to said lands in the United States or make them again a part of the public domoin of the General Government. The United States did not consider that said release had any such operation or effect, for with all the facts before Congress the act of March 2nd, 1889, was passed declaring a formal forfeiture of said lands for breach of the condition subsequent. If said release had been either valid or only voidable Congress could and would have recognized or ratified it, and thus readily have confirmed all subsequent acts of the Land Office in connection therewith. This was not attempted, but a formal forfeiture was declared, and the United States then and at that date reasserted ownership of the land. This was a clear legislative recognition of the fact that the title of the United States had not previously thereto reattached so as to make said lands the property of the Government.

36 Again it is disclosed in the record that notwithstanding said release by the Governor in 1870 the State, through its executive, in 1872 or 1873, disputed the validity of said release and still asserted title to said lands, not as the beneficial owner thereof,

but as trustee under the act of 1856. This claim was not only made by the State, but her board of control of railroad grants acted upon the assumption of its validity in conferring said lands upon another railroad company, which action the Legislature of Michigan confirmed. Until Congress passed the act of March 2nd, 1889, reasserting the United States' ownership of these lands, the claim asserted thereto by the State as trustee remained unsettled or undetermined by any competent authority. Tho United States did not by any authoritative act or declaration dispute the State's claim to the lands made after said release had been executed by its Governor, nor did Congress pass any "Act directing the possession and appropriation of the property, or that it be offered for sale or settlement." Under such circumstances and conditions it is doubtful, upon the authority of Newhall *vs.* Sanger, 92 U. S., 761, whether said lands were open to appropriation or selection under other grants subsequent to the act of 1856, even assuming that the validity of said release by the Governor would be ultimately sustained by the courts; but said release being invalid and void for want of authority to execute the same, the lands were not thereby restored to the United States and with no title in the United States till forfeiture, declared in March, 1889. It is clear that said lands were not open to selection or appropriation under grants subsequent to the act of June 3, '56.

It is not deemed necessary to notice all the consolidations that were from time to time effected between the several railroad
37 companies or the mortgage executed by the Chicago, St. Paul & Fond du Lac R. R. Co. or the sale thereunder and the purchase by the C. & N. W. Railway Co. These matters are not material, because it is manifest that the dealings and transactions "*inter sese*" of companies designated as the beneficiaries of said grant of 1856 could in no way change or impair the trust created by the United States and accepted by the State nor authorize any diversion of the lands appropriated to construction of the several lines of railroad to any other purpose or use.

It is claimed on behalf of plaintiff, and was so ruled by the trial judge, that the effect of the State's act of Feb'y 14, '57, was to vest the legal title to the lands granted to aid in the construction of the line of road from Ontonagon to the Wisconsin State line in the Ontonagon and State Line Railroad Co; that such legal title by consolidation passed to the Chicago, St. Paul and Fond du Lac R. Co., thence to the Chicago & Northwestern Railway Co., by whom it was surrendered to the State under the release of June 17, '70, and from the State to the United States by the Governor's certificate and surrender, executed August 14, '70. We have already seen that said release of the Governor did not operate to revest the title to the lands in question in the United States, nor is the position correct that under the operation of the act of Feb'y 14, '57, the legal title to the lands granted for the benefit of the Ontonagon line of railroad was vested in said Ontonagon and State Line Railroad Co. The legal title was essential to the trust which the State accepted, and the granting act never authorized the Legislature of the State to convey or pass the legal title to said lands to said

company. The scheme of the trust created by Congress
38 clearly contemplated that the State as trustee should hold and retain the legal title to the lands, and the 4th section of the granting act prescribed the time and manner in which said lands should be disposed of by the State as trustee. The object and purpose of the State act of Feb'y 14, '57, was to accept the trust and to designate the companies which might, by completing the several railroads, become the beneficiaries of the trust estate. Said act only conferred upon the respective companies therein named the right to earn the lands or the proceeds thereof appropriated to them respectively. When the lands were selected for the respective lines the Secretary of the Interior, after having approved such selection, certified the same to the State and not to the several railroad companies. The act of June 3, '56, was a grant "*in presenti*" to the State and passed the title to the said sections of land along the designated lines of road. Upon the location of said roads and the selection of the sections and their certification by the department to the State the legal title thereto was completely vested in the State as trustee. The disposal thereof for the purposes specified, as the trusts indicated, was left with the Legislature, but the manner, and only manner, of such disposition was prescribed. That manner did not contemplate or authorize the trustee to grant or convey the legal title direct to the several railroads whose construction was intended to be aided. While the act of Feb'y 14, '57, employs some language which might purport to grant the lands to the several companies, the clear object and purpose of that act was, after accepting the grant, to confer upon the several companies designated the rights, powers, privileges, and benefits which were intended for their respective lines by the act of Congress. They were the designated bene-
39 ficiaries of the trust, with the legal title retained in the State as the trustee. This is made clear by reference to the act of the Legislature approved March 8th, 1865 (p. 93, H. R. grant), which provided for the issuance of patents for railroad lands whenever the company or companies should become legally entitled to such lands. The patents to be issued were to be "*prima facie*" evidence of title; but such patents conveying the title were only to be issued as the companies respectively finished and put in running order any section or sections of 20 continuous miles of their line of road. If the title had already passed by the act of 1857, this act of 1865 was idle and inoperative. But, aside from this, it is settled by the decision of the Supreme Court in the case of Schulenberg *et al. vs.* Harriman, 21 Wallace, pp. 50 and 59, that the State, under the terms of the grant from Congress, had no authority to dispose of land beyond 120 sections, except as the road in aid of which the grant was made was constructed. In the present case no portion of the road was built. The legal title to the lands in question did not, therefore, pass to the Ontonagon & Wisconsin State Line Railroad Co. by the act of Feb'y 14, '57, but remained in the State.

Was that legal title ever acquired by the plaintiff or those under or through whom it claims? I am clearly of the opinion that it was not. The acts of March 3rd, 1865, and July 3rd, 1866, under

which plaintiff derives its rights, whether considered and construed in "*pari materia*" or not, did not and could not confer upon it a legal title to the land in controversy. The act of 1866, treated as an independent grant, not controlled by the act of 1865, as to the location of the lands granted to aid in the construction of the harbor & ship canal at Portage Lake, was the one under which plaintiff asserts its claim to the land in litigation, the same being
40 a part of the 142,430.23 acres granted the State in 1856 for the benefit of the Ontonagon & Wisconsin State Line railroad and certified to the State by the land department in December, 1861. The act of July 3rd, 1866, was a grant *in presenti* to the State. It covered and embraced 150,000 acres of land to be selected from alternate odd-numbered sections and 50,000 acres from even-numbered sections of the lands of the United States. Upon its acceptance of the grant, on March 27, '67, there passed to the State at that time, if not at the date of the grant, the title to 200,000 acres of the designated sections of public lands to be afterwards selected and located, which selection and location would simply operate to perfect the grant, to identify the lands covered by it, and give precision to the title, and by relation have the same effect upon the selected sections as if the grant had specifically described them. It admits of no question that this grant of 1866 was not intended to cover or convey to the State lands which had been previously granted by the act of June 3rd, 1856. It did not, either in express terms or by any implication, attempt to make any new appropriation of the lands granted by the act of 1856. The purpose of the act of July 3, '66, as well as its legal effect and operation, was to grant to the State, for the benefit of the canal Co., 200,000 acres of public lands remaining at the disposal of the United States. That the lands granted to the State by the act of June 3, '56, to aid in the construction of the Ontonagon and State Line road and which were identified by selection and certification in 1861 did not and could not again pass to the State by the act of July, 1866, for a different purpose, the United States not having declared any forfeiture or reasserted ownership thereof for breach of condition subsequent, is too clear for argument, as it is settled by an unbroken line of authorities. See—

Wilcox *vs.* Jackson, 13 Peters, 498;
41 Eldred *vs.* Sexton, 19 Wallace, 189;
Leavenworth, L. & G. R. Co. *v.* United States, 92 U. S., p. 733;
Newhall *v.* Sanger, 92 U. S., p. 761;
Glasgow *v.* Baker, 128 U. S., 560, and
Johnson *v.* Ballou, 28 Mich., 379.

If the United States had forfeited the grant of 1856 and reasserted their title to these Ontonagon lands before the canal Co. made its selection of odd sections under the grant of 1866 from or out of said lands, it is probable that such location and appropriation would have been valid under the authority of Ryan *v.* R. R. Co., 99 U. S., 382; but, the title to the $142{,}430\frac{23}{100}$ acres of clear lands on the Ontonagon line not having been restored to the United States, but remaining in the State, the attempt to select about 15,000 acres

from said lands and appropriate the same to the grant of 1866 was without any authority of law and wholly invalid.

When the grant of 1866 was accepted the State occupied the position of trustee under two separate, distinct, and clearly defined trusts. It held the title to 142,430 $\frac{23}{100}$ acres under the grant of 1856 for one exclusive purpose; it also held the title to 200,000 acres of other and different lands for another beneficiary. Both trusts were created by a common grantor. Without the consent of the United States, expressed in some authoritative way, and the assent of the "*cestui que trust.*," how or upon what principle of law could the State divert the lands applicable to one trust or object and appropriate them to another and different object or trust? The mere statement of the question is sufficient to show that such a proceeding would violate every principle of the law of trusts. The State could not possibly, by any action of its officials or even of its
42 Legislature, have conferred the Ontonagon lands or any portion thereof upon the canal Co. This is well settled by the authorities.

Schulenberg *v.* Harriman, 21 Wallace, 44.
Johnson *v.* Ballou, 28 Michigan, 379.

But the State never, in fact, directed or attempted any such breach of trust. Governor Crapo, in appointing T. J. Avery (then the president of the canal Co.) the agent of the State to select the 200,000 acres granted by the act of July, 1866, directed said Avery to make said selection from any lands in the Upper Peninsula that were subject to private entry. Under date of May 3rd, 1867, the commissioner of the land department instructed the register and receiver at Marquette that "in satisfying the claim under said act of 1866 we are restricted to the region of country contemplated by the act of 1865 and embraced in the withdrawal above mentioned. Consequently the selections from odd sections to make up the 150,000 acres and from even sections to cover the 50,000 acres are necessarily restricted to that portion of your district." Withdrawals of public lands in the Upper Peninsula were made to satisfy said grant of 1866. The president of the canal Co., acting also as the agent of the State in selecting the lands under said grant, in May, 1871, selected about 15,000 acres out of said grant of 1856 for the Ontonagon and Wisconsin State Line road, and the same were by the land dep't or commissioner approved to the State of Michigan on May 22, '71, for the benefit of said canal company.

Conceding to this certification the force and effect of a patent, it was void, because the lands had been previously granted and appropriated, and were thereby removed or withdrawn from the jurisdiction of the land department and not subject to its au-
43 thority or control. No right or title was thereby conferred upon or vested in the canal Co. to said lands. This is settled by numerous authorities.

Stoddard *v.* Chambers, 2 Howard, 285.
Bissell *v.* Penrose, 8 Howard, 317.
Minter *v.* Cromelin, 18 Howard, 87–89.

Eaton *v.* Salisbury, 21 Howard, 426–432.
Reichart *v.* Phelps, 6 Wallace, 160.
Morton *v.* Nebraska, 21 Wallace, 660.
Shepley *v.* Cowan, 91 U. S., p. 330.
Sherman *v.* Buick, 93 U. S., p. 209.
Smelting Co. *v.* Kemp, 104 U. S., p. 636.
Steel *v.* Smelting Co., 106 U. S., p. 447.

These cases, with others that might be cited, establish the general principle that a patent issued by the executive department of the Government for lands previously granted or disposed of or otherwise appropriated or reserved from sale by Congress is inoperative to pass any title, for want of jurisdiction over the subject and authority of law to execute the conveyance. The rule is especially applicable where the United States have by previous act of Congress granted the lands which thereafter and while such grant is in force cease to be public lands of Government subject to the control or disposing power of the land department.

The lands selected and appropriated to the Ontonagon line in 1861 under the grant of 1856 not having been restored to the public domain, as already shown, were not subject to selection and certification for the canal Co. in 1871, and the act of the department in permitting such selection and in approving the same was wholly without authority of law and void, and communicated no
44 title, legal or equitable, to the canal Co.

But it is urged on behalf of plaintiff that said certification by the department, together with the action of the Governor in certifying to the completion of the canal under the State act of M'ch 8, '65, conferred upon the Canal Co. a "*prima facie*" title to said 15,000 acres of land, which cannot be collaterally questioned, disputed, or attacked by the defendant, because he does not connect himself with the title or show any interest in the land, but is a mere intruder or trespasser. Cases are cited which, at first sight, apparently support this position, but when carefully examined they are not applicable to this case. The decisions relied on establish the general rule that where the land granted or approved for selection or entry is part of the public domain of the United States, over which the executive or land dep't has jurisdiction or may lawfully exercise a discretion, or in respect to which the law invests it with "quasi-judicial" functions, a patent or certificate issued for such lands, although irregular and erroneously issued, cannot be collaterally attacked in an action of ejectment by a defendant who is a mere trespasser or intruder. In such cases the power or authority of law to issue the patent exists, and irregularities or mistakes in its exercise cannot be taken advantage of by a defendant at law who does not connect himself in any way with the title or show any right to the land. But the present case does not come within that rule. Here the lands attempted to be conveyed or patented were not a part of the public domain of the Government, and the land department had no power or authority of law to dispose of them, nor was it vested with any discretion or jurisdiction over them. Its action in certifying the land to or for the

canal company was, therefore, not merely irregular or voidable, but was absolutely void and wholly inoperative to confer any
45 right or pass any title. In cases of the latter character the defendant in ejectment may always attack the plaintiff's title or show an outstanding title in another. This is settled by the following cases:

Polk's Lessee *v.* Wendell, 9 Cranch, 87.
Patterson *v.* Winn, 11 Wheaton, 381.
Minter *v.* Cromelin, 18 Howard, 87–89.
Reichart *v.* Phelps, 6 Wallace, 160.
Smelting Co. *v.* Kemp, 104 U. S., pp. 641, 646.
Steel *v.* Smelting Co., 106 U. S., 447.
Reynolds *v.* Iron Silver Mining Co., 116 U. S., p. 687.
Doolan *v.* Carr, 125 U. S., 618.

In the two last cases the Chief Justice dissented from the opinion and judgment of the court on the express ground that the defendant, being a mere intruder, could not collaterally question or attack the "*prima facie*" title which the patent conferred upon the plaintiff. But the court held otherwise, upon the distinction above indicated, which is founded upon the well-established rule that in the United States courts a recovery in ejectment can be had only upon the strength of the plaintiff's own title, which must be the strict legal title.

Proprietary *v.* Ralston, 1 Dall., 18.
Watts *v.* Lindsay, 7 Wheaton.
Foster *v.* Mora, 98 U. S., 425.
Reynolds *v.* Iron Silver Mining Co., 116 U. S., 687, 688.
Johnson *vs.* Christian, 128 U. S., 374–382.

The Governor's certificate as to the completion of the canal, in pursuance of the State act of March 8, '65, did not and could not operate either to confirm or give any validity whatever to the void act of the land department in approving or certifying to the
46 State for the benefit of the Canal Co. said 15,000 acres of land previously granted and appropriated to the construction of the Ontonagon and Wisconsin State Line railroad; but it is insisted by counsel for the plaintiff, and the trial judge so ruled, that as the agent appointed by the State selected said lands for the canal Co., which selection was approved by the land department and certified to the State for the benefit of said company, and the Governor thereafter, under the authority of said act of 1865, certified to the completion of the canal, the State of Michigan is or would be estopped from disputing or denying the title of plaintiff thus acquired, and that this estoppel against the State will preclude the defendant from setting up any such outstanding title to said lands in the State. It is not deemed necessary to enter upon any review of the authorities upon the question of when or under what circumstances the doctrine of estoppel may be invoked against the sovereign. The Government is not ordinarily bound by an estoppel.

Johnson *v.* U. S., 5 Mass., 425.
Carr *v.* United States, 98 U. S., 433.

Individuals may be estopped by unauthorized acts of their agents apparently within the scope of their agency, but the Government is rarely, if ever, estopped by the unauthorized acts or declarations of its agents.

But if the State can ever be estopped by the unauthorized acts or declarations of its agents or officers the facts of the present case do not call for or warrant the application of the doctrine. The Canal Co. was not misled to its injury by any act of the State or its officials. Its own officer acted in violation of his instructions from the Governor in selecting said lands. The company knew the lands had been previously granted, was affected with full notice of the
47 public acts of Congress, of the land department, and of the State in relation thereto, and assumed to act for itself in selecting what it could not legally appropriate. The State was guilty of no deception or fraud in leading the company to select said lands. To make the doctrine of estoppel apply to title to real estate, the party invoking its aid must not only be misled to his hurt, but he must also be destitute of knowledge of the true state of title and also of the means of acquiring such knowledge.

Brant *v.* Virginia Coal Co., 93 U. S., 326.

The canal Co. does not bring itself within this rule. It was not misled and it knew the state of the title.

But for another and still stronger reason the doctrine of estoppel can have no application to this case. An estoppel can never exist where the party, whether an individual, a corporation, or a government, against whom it is invoked has no power or legal capacity to lawfully and directly do the act which is sought to be confirmed by precluding its denial. It is an essential element in the legal principle on which the doctrine of estoppel rests that the party against whom it is asserted should have possessed the authority or power or legal capacity to have directly done the act in some lawful way. It was not within the power or legal capacity of the State as trustee to have appropaiated the lands in question to the canal Co. or to have vested it with the title thereto, and no act or declaration of the State officials can estop the State from denying what it had no authority to do directly.

Upon the whole case the conclusions of this court are—

1st. That the title to said lands was not restored to the United States, nor were said lands made public domain until the
48 passage of the forfeiture act of March 2, '89.

2nd. That no title thereto was ever acquired by the canal Co. by the acts and transactions which preceded said forfeiture act of Congress.

3rd. That the defendant, even as a mere intruder, and aside from any right acquired under said act of M'ch 2, '89, may and has successfully disputed plaintiff's "*prima facie*" title arising from the certification thereof for its benefit; and

4th. That there is no estoppel, either upon the State or the defendant, against disputing or denying the validity of such "*prima facie*" title.

It results, in the judgment of this court, that there should be a new trial in this case, at which the plaintiff will have to claim a confirmation of its title, to the exclusion of defendant's right, from the act of March 2nd, 1889, the construction and legal effect of which is not now passed upon.

(Signed) HOWELL E. JACKSON,
*Circuit Judge.*

(Filed March 1st, 1890.

C. L. FITCH, *Clerk.*)

49 *Opinion—Brown, Judge.*

THE LAKE SUPERIOR SHIP CANAL, RAILROAD & IRON COMPANY
*vs.*
WALTER A. CUNNINGHAM.

Having sat with my brother judges during the argument of this case, I am requested by them to express my views upon the questions involved. The limited time at my disposal and the urgency of business in my own district forbid my entering into a lengthy discussion of the various points or doing much more than to announce my general conclusions. Having had recent occasion in the case of Shepard *vs.* The Northwestern Life Insurance Co., 40 Fed. Rep., 341, to examine the original railroad land-grant act of June 3d, 1856, I was of the opinion—

1. That the act was a present grant of lands included in its terms to the State, and that no further conveyance by the Government was contemplated. (Schulenberg *vs.* Harriman, 21 Wall., 44; Johnson *vs.* Ballou, 28 Mich., 416.)

2. That while the act passed the title of these lands to the State, such divestiture of title did not operate as to any particular lands until they had been selected and certified to the State.

3. That the State took the title to such lands as trustee for the railroads named in the first section of the act, and for no other purpose whatsoever.

4. That the provision in the act that all lands remaining unsold for ten years should revert to the United States if the roads were not then completed was a condition subsequent, and that upon breach of such condition such lands would not revert to the United States without judicial proceedings authorized by law or a forfeiture asserted by legislative act.

5. If the question how many railroads were contemplated by this act depended for its solution solely upon the language of the
50 act itself there would be strong reason for holding that they were limited to three, viz., one in the Upper Peninsula, one from Amboy and Grand Rapids to Traverse Bay, and one from Grand Haven and Pere Marquette to Port Huron by the way of Flint. But in view of the act of acceptance by the Legislature of February, 1857, whereby the lands in the Upper Peninsula were conferred upon four separate roads, and in view of the subsequent

action of the Federal Government in connection therewith, I think the act should be construed as authorizing the formation of corporations for the construction of separate roads from Marquette and Ontonagon to the State line. It is true the two roads from Marquette and Ontonagon, upon which a portion of the lands was conferred by the Legislature, were consolidated with the Chicago, St. Paul and Fond du Lac railroad, and thus became one corporation, and that this road filed two maps with the Commissioner of the General Land Office, one of which was from Fond du Lac through Wisconsin to the Michigan line and the other of which was from Marquette and Ontonagon to the State line; and in his acceptance of these maps the Commissioner of the Land Office speaks of these as one road with separate branches from Ontonagon to Marquette; yet the subsequent dealings for several years thereafter were wholly with the Marquette line, which was treated as a separate and distinct road. After the acceptance of these maps nothing further appears to have been done until the foreclosure of the mortgage given by the Chicago, St. Paul & Fond du Lac railroad, including its right to these lands and the purchase of its rights and franchises by the Chicago & Northwestern. From this time forward the line from Marquette to the State line appears to have been treated as a separate road. The Michigan Legislature, by the act of 1861, after reciting the insolvency of the Fond du Lac railroad, enacted that the
51 lands appropriated to the construction of such road be placed in charge of the board of control, with power to confer them upon some other competent company for the construction of such road. The Commissioner of the General Land Office, in December of that year, certified to the State 112,145 acres "to aid in the construction of a railroad from Marquette to the Wisconsin State line, and known as the Chicago, St. Paul & Fond du Lac railroad," and at the same time certified to the State 142,430 acres "to aid in the construction of a railroad from Ontonagon to the Wisconsin State line, and known as the Chicago, St. Paul & Fond du Lac railroad." In April of the following year the board of control, acting under the authority of the legislative act of the preceding year (1861) and with the consent of the Chicago & Northwestern railroad, which had succeeded to the rights of the Fond du Lac road, recommended and requested that Congress authorize the relocation of the lands granted for the purposes of the road from Marquette to the State line, so as to conform to the new line adopted by the Peninsula Railroad Company, and ordered that all the lands, etc., granted by Congress to aid in the construction of the railroad from Marquette to the Wisconsin State line should be conferred upon the said Peninsula Railroad Company. In compliance with such request Congress, by joint resolution of July 5, 1862, authorized the relocation of the line of railroad from Marquette to the State line, with a provision that the Governor should certify that the State had surrendered all its claim to the lands originally certified. In such case the State was entitled to receive a "like quantity of land selected in like manner upon the new line." If any doubt had previously existed as to the proper construction to be given to the act of 1856 I regard it as settled

by this joint resolution, which, in my view, contemplated a
52 distinct line of road from Marquette to the State line. Thereupon the Peninsula railroad released to the United States the original land granted to the Marquette & State Line railroad and became consolidated with the Chicago & Northwestern. A joint resolution of the Legislature also authorized the Governor to execute a certificate of non-encumbrance and surrender of the lands on the original line of the Marquette & State Line railroad, but made no mention of the Ontonagon line. This surrender was executed by Governor Crapo in 1866. During all this time the grant to the Ontonagon line had remained in abeyance, nothing having been done since 1857, when the maps were filed and the land certified in the State. On July 13th, 1868, the Commissioner of the General Land Office, in a letter to the solicitor of the Chicago & Northwestern railroad, called his attention to the lands "for the branch line to Ontonagon" and requested the State Line Railroad Company to execute a release of such lands; and thereupon the Governor, on August 14th, 1870, acting upon the opinion of the attorney general, executed a similar surrender and release of the lands certified to the State for the benefit of the Ontonagon line.

6. I think this release, not having been authorized by any act of Congress or the State Legislature, was a nullity, and the trust created by the original act of 1856 remained unimpaired until the right of the State to these lands was forfeited by judicial or legislative act. I do not understand that the Governor of the State has any general power by virtue of his office to convey lands held by the State, either in fee simple or in trust for another. His only authority to release lands vested in the State by the original act of 1856 was limited to the lands originally selected for the construction of the line from Marquette to the Wisconsin State line. The letter
53 of July 13, 1868, from the Commissioner of the Land Office would seem to indicate that he considered the Ontonagon line as a mere branch of the line to Marquette, when in fact these lands had been allotted to a distinct corporation. Three years thereafter Governor Bagley, who had succeeded Governor Baldwin, in a communication to the Secretary of the Interior, called his attention to the action of his predecessor, and claimed that the surrender of these lands was without authority of Congress or the Legislature, and requested that they be withheld from sale. Upon receipt of such letter the restoration of these lands to sale was suspended, an investigation was had, and the Secretary of the Interior came to the conclusion that his predecessor had erred in demanding a release of the lands granted for the Ontonagon line and was of the opinion that the title was still in the State of Michigan. Thereupon and in 1880 the Ontonagon and Brule River Railroad Company was organized for the purpose of constructing a road from Ontonagon to the State line, and the board of control declared the lands forfeited to the State and vested the same in the newly organized company.

7. In March, 1889, no steps having been taken to build the road, Congress passed an act forfeiting to the United States and resuming title to all lands granted by the act of 1856 "opposite to and co-

terminous with the uncompleted portion of any railroad to aid in the construction of which said lands were granted" and all such lands were declared to be a part of the public domain. Then for the first time these lands became subject to private entry. Long prior to this act and in 1871 the canal company, through P. J. Avery, its agent, acting under authority of a certain act of Congress passed in 1866, making grant of "lands of the United States" for the construction of the Portage Lake ship canal, selected fifteen thousand acres of
54 these lands originally reserved for the building of the Ontonagon & State Line road. This, like the act of 1856, was a grant *in presenti*, and in the uniform construction given such grants by the Supreme Court did not operate to convey lands which had been previously appropriated for other purposes or the title to which was not at the time of the selection then in the United States. I see no escape from the conclusion that the selection of these fifteen thousand acres, the title to which was then in the State, was void, and the canal company took no title to the lands. I see no evidence of fraud on the part of the company or its agent in making the selection, as they seem to have relied upon the legality of the release executed in 1870, and if the Governor had had authority to make the surrender and release of the lands appropriated to the Ontonagon line I see no reason why the canal company would not have taken a perfect title to them.

Nor do I see any reason for imputing fraud to the State. The act of the Governor on releasing these lands was undoubtedly *bona fide* and was done after consultation with his official adviser, the attorney general. I have given my reasons for believing that he was mistaken, but his act was simply in excess of his authority and is not imputable to the State. The State itself, acting through its authorized voice, the Legislature, was simply silent, doing nothing to affirm or disaffirm his conduct. When the land grant was made in aid of the ship canal company the lands were conferred by the Legislature upon the Portage Lake & Lake Superior Ship Canal Company, subject to all the conditions of the original grant; but there was no attempt by the Legislature to interfere with lands already granted in aid of the railroad or to dispossess it of
55 the title it might acquire by building the road. Mr. Avery in selecting such lands was apprised of the state of the title and took the risk of the legality of the Governor's action. Had the State in 1871 held the title to these lands in fee simple there could be no doubt of its power to confer them upon the canal company, but holding them as trustee for a special purpose it had no right to divert them from that purpose and grant them to another for a different purpose. The Governor, the board of control, and the Commissioner of the General Land Office are simply the agents for certain purposes of their respective sovereignties and possess no powers not conferred by general statutes or special enactments, and I know of no legal principle by which the State or General Government can be estopped by the acts of their officers in excess of their authority.

8. I do not think that the act of forfeiture of 1889 enured to the

benefit of the canal company. That act was a complete forfeiture of the right of the State to hold the lands for any purpose. It cut off all right which the State then had to these lands, but it conferred no title upon the canal company and left this company standing in the position of a naked trespasser. The act of 1866 did not confer these lands upon the State, because the grant was limited to lands then belonging to the United States, and the State never received a subsequent title to these lands which would inure, by way of estoppel, in favor of the canal company. In the case of the Leavenworth, etc., Railroad Co., 92 U. S., 733, it is said of a land-grant act similar in its terms to the act of 1866 that the State takes an immediate interest in the land whereto the complete title is in the United States at the date of the act. But if they are at that time reserved for any purpose whatever they are excluded from the operation of
56 the act, and it is immaterial whether they subsequently become a part of the public lands of the country. A subsequent sale and grant of the same lands to another person is absolutely null and void so long as the first appropriation continues in force. (Simmons *vs.* Wagner, 101 U. S., 260.)

9. Can the defendant, who shows no title to these lands in himself, and who, for aught that appears, is a mere trespasser, set up this title in the State when the State itself has conferred title upon the plaintiff? This is the most difficult question in the case and one which caused considerable embarrassment in the Shepard case, although I finally held in that case that, as both parties claimed title under the act of 1856, the doctrine of common source applied, and neither could set up against the other a title antedating that act. The general rule in actions of ejectment is that the defendant may show an outstanding title in a third person. Does this rule apply in this case? The decisions of the Supreme Court upon this point are to a certain extent misleading; and while there may be no direct conflict between them, there are certain expressions in some of the opinions which indicate that the point had not received attentive consideration from the justice who delivered the opinion. In discussing this question we are bound to assume that the grant to the canal company was void, for the reason that the State had no title to the thing granted, as stated in Polk's Lessees *vs.* Wendell, 9 Cranch, 87. It was said of this case, in Patterson *vs.* Winn, 11 Wheaton, 384, that it had settled the doctrine of this court "that if a patent is absolutely void upon its face or the issuing thereof was without authority, or was prohibited by statute, or the State had no title, it may be impeached collaterally in a court of law in an act of ejectment." It would be a mere waste of time, however, to examine and distin-
57 guish all the cases upon this point, since all of them were subjected to a searching criticism in Doolan *vs.* Carr, 125 U. S., 615, and the conclusion reached that if the officers of the Government act without authority, "if the land which they purported to convey had never been within their control or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act upon the subject-matter of the patent—not merely voidable."

In Reynolds *vs.* Iron Silver Mining Company, 116 U. S., 687, the rule is stated somewhat differently—that in all actions to recover possession of real estate the plaintiff can only recover on the strength of his own title and not on the weakness of the defendant's title. On the other hand, if the patent has been obtained by fraud it can only be set aside by a bill in equity at the suit of the United States, and private persons, particularly in a suit at law, are in no position to attack its legality. So, if an executive officer of the Government is vested with a *quasi* judicial function to determine what land shall pass in respect to their character, his determination is the only criterion of ascertainment and cannot be impeached. Steel *vs.* Smelting Co., 106 U. S., 447 ; Doll *vs.* Meadoe, 16 Cal., 295. In Doolan *vs.* Carr the land was patented to a railroad company February 28th, 1874, and the railroad company conveyed to Carr, the plaintiff, June 10th, 1874. No attempt was made by the United States to annul the patent. On the 10th of November, 1882, the defendant Doolan and one McCue each entered on 160 acres under a claim of pre-emption settlement. Each of them then made and subscribed a declaratory statement of his intention to claim and pre-empt the land on which he had settled under the laws of the United States, and presented it to the register of the proper land office, but he refused to receive it on the ground of the
58 existence of a patent to the railroad company. The position assumed by the Chief Justice in his dissenting opinion is practically the same as that occupied by the plaintiff in the case under consideration. The principal cases upon which he seemed to rely were Hoofnagle *vs.* Anderson, 7 Wheaton, 212, in which an attempt was made by a private individual to attack the patent upon the ground of fraud and mistake, and it was held, following out the distinction above noted, that as the patent appropriated the land any defects in the preliminary steps required by law were cured by the patent. Says the Chief Justice: "If a patent has been issued irregularly the Government may provide means for repealing it, but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself." In other words, the patent in that case was not void, but voidable, and it could only be voided by a suit brought by the Government for that purpose. In Cooper *vs.* Roberts, 18 Howard, 173, the plaintiff claimed that his land had been allotted to the State of Michigan for the use of schools, while the defendant relied upon a license given by a mineral agent, and objected that the officers of the State violated the statutes of Michigan in selling these lands after they were known or might have been known to contain minerals. It was held that the defendant was not in condition to raise this issue, and the patent was held conclusive of the fact of a valid and regular sale. This is not the case of a patent located upon lands previously reserved for another purpose. In Field *vs.* Seabury, 19 Howard, 323, it was held that a third party cannot raise in ejectment the question of fraud as between the grantor and grantee and thus look beyond the patent or grant. A similar ruling was made in Spencer *vs.* Lapsley, 20 Howard, 264.

59 In line with these cases is that of Ehrhardt *vs.* Hogeboom, 115 U. S., 67, in which it was held that oral evidence was inadmissible on the part of defendant to show that certain lands were not open to settlement under pre-emption laws, but were swamp and overflowed lands which passed to the State under another act, the court holding it to be the duty of the land department to determine whether land patented to a settler is of the class subject to settlement under pre-emption laws, and that his judgment upon this fact was not open to contestation in an action at law by a mere intruder without title. In Frisbie *vs.* Whitney, 9 Wal., 187, a certain Mexican grant having been declared to be invalid, a rush was made to pre-empt the lands covered by the grant, and it was held that such pre-emption, accompanied by force, was not valid to oust the title of one already in possession of the land. The case evidently turned upon the fact of the actual occupation of the land by the one party and his forcible dispossession by another party.

The defendant in the case under consideration stands practically in the same position as the defendant in Doolan *vs.* Carr. He took possession under a claim of right to the benefit of the pre-emption or homestead laws of the United States, and his claim was rejected upon the ground that the lands had been previously patented to the canal company. It seems to me this case cannot be distinguished from Doolan *vs.* Carr, and that the principles announced by the majority of the court in that case apply with equal force here.

HENRY B. BROWN.

Filed March 1st, 1890.

C. L. FITCH, *Clerk.*

60 (*Opinion, Severens, Judge.*)

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

THE LAKE SUPERIOR SHIP CANAL, &C., COMPANY
*vs.*
WALTER CUNNINGHAM.

A verdict and judgment having passed for the plaintiff upon the trial of this cause at the last May term of this court, at Marquette, a motion for a new trial was entered, and was heard in the autumn by the circuit and district judges sitting together.

Very full and elaborate arguments were made on both sides, and much assistance has been thereby afforded.

I have given careful attention to these arguments and to the authorities referred to by counsel in their support, and after much reflection upon the case am of opinion that the verdict and judgment are right.

The court was in error in the proposition, stated at the trial, that the act of the Legislature of Michigan of Feb. 14, 1857, conferring the lands granted by the act of Congress of 1876 upon the several corporations therein mentioned, operated to transfer the legal title.

But I am of opinion that the precise nature of the rights conferred is not material to the proper determination of the present controversy in the view which I think should be taken of the
61 principal facts and their consequences.

It is a question of grave doubt whether Congress intended by the act of 1856 to provide for two distinct railroads from Marquette and Ontonagon to the Wisconsin State line rather than one having branches to each of the former termini. The words descriptive of that proposed railroad are grouped together. In the contemporary act granting lands to the State of Wisconsin upon which the case of Schulenberg *vs.* Harriman, 21 Wal., 44, arose the grant was declared to be for the purpose of aiding in the construction of a railroad from Madison or Columbus by way of Portage City to the St. Croix river or lake and from thence to the west end of Lake Superior and to Bayfield. The latter place is upon Lake Superior and some sixty miles east of Superior City, at the west end of Lake Superior. Marquette and Ontonagon, also on Lake Superior, are about ninety miles apart. A diagram of the line of this Wisconsin railroad is shown at p. 46, in the 21st of Wallace. Obviously the line contemplated by that act was a unit, although branches would be necessary to reach the two northern termini.

The act of the State Legislature in apportioning the grant to different companies does not appear to me to be of consequence in the construction of the granting act. Congress did not concern itself with that, and the State was at liberty to constitute one, two, or more companies to build railroads on any parts of the lines of roads as it might think expedient.

And while the lands were originally conferred on two corporations, yet when they were actually located and certified there was but one company, the originals having been absorbed by consolidation, under the laws of the State.

As a matter of fact, however, two distinct lines were never
62 located southward to the Wisconsin State line, but part of the way only and then in common. It is true that as located the single part of the line was shorter than either branch. But there was nothing in the act of 1856 to prevent the point of junction being located much further to the north with branches starting off more nearly at right angles.

It seems to me, therefore, that there was strong reason for holding, as the Department of the Interior appears to have done, that the line of railroad contemplated by the act of 1856 was regarded as an entirety, and that for these reasons, and inasmuch as the change of the location of that part of the line running from Marquette to the Wisconsin State line to the new line contemplated by the act of 1862 would swing the southern part of the railroad entirely out of all relation to the rest of the line and leave the remnant without connections, it was probably the expectation of Congress that all the lands selected for the one object of the grant of 1856 would be surrendered.

Nor do I think that the doctrine stated and applied in St. Louis, &c., Railway Co., *vs.* McGee, 115 U. S., 469, that a forfeiture must be

indicated by express or unequivocal language of Congress in order to work a resumption, has application here. The act of 1862 was not an act for forfeiture, but was in the nature of contract dealing, and in my opinion should be construed by the rules applicable to such.

It can hardly be doubted that Congress understood when the act of 1862 was passed that the granted lands for this road had been selected by and certified to the one railroad company which
63 had become possessed of all the franchises of the entire road.

The Interior Department, in consideration of the reasons before it, held that the act contemplated a surrender of all the lands which had been certified to it for the entire road and required such surrender before it would certify the lands selected in exchange. If that decision was correct it would seem to end the question. But if this holding of the land department is now adjudged to have been erroneous it remains to consider what has been done upon the footing of it and the consequences resulting therefrom.

At a date subsequent to the time when these lands became subject to forfeiture they were surrendered by the beneficiary to the State, and by the executive of the State and under the seal thereof they were surrendered to the United States in accordance with the requirements of the executive department of the latter and the request of the railroad Co.

The State thereafter selected a part of the lands thus surrendered under the canal grant and bargained them to the canal Co. as the consideration for the construction of that work. That selection was made by the officer designated by the act of Congress to represent the State. It is not material that the lands were not part of the grantable lands of the Government at the date of the act. Ryan *vs.* Railroad Co., 99 U. S., 382. The canal grant was not a grant of any particular lands. It was floating until it attached upon these lands by the selection of the State and the approval of the Interior Department, In the language of the court in Cooper *vs.* Roberts, 18 How., 173, 179, "the *jus ad rem*, by the performance of that executive act, became a *jus in re*, judicial in its nature." By the method prescribed by Congress and the only means by which the State could acquire a fixed interest in any land these lands were selected by the State, and by the method prescribed by the State itself they were bargained and certified to the canal
64 Co. for a valuable consideration and that consideration fully paid. This was before any complaint or criticism about the surrender had been made in any quarter.

Subsequent to the surrender by the State to the United States and prior to 1889 a very large proportion of the whole body of lands thus surrendered on the Ontonagon Branch had been sold and patented by the United States to private individuals, and during that period of eighteen years the legislative department of the Government did nothing to indicate any disapproval of what had been done in its behalf. If the legislative department was content with what had been done by the executive in resuming control of these lands there was no occasion to take action.

Neither a legislative declaration nor a judicial forfeiture is necessary when the grantor has acquired actual dominion and control of the land granted upon condition.

Fichet *vs.* Adams, 2 Stra., 1128.
Hamilton *vs.* Elliott, 5 Serg. & R., 375.
Andrews *vs.* Seuter, 32 Me., 394.
Willard *vs.* Henry, 2 N. H., 120.
Rollins *vs.* Riley, 44 N. H., 9, 13.

I do not think there is anything inconsistent with this in what the Supreme Court has held upon the subject of forfeiture.

There was no fraud on the part of the canal company in selecting these lands. All was done publicly and with the concurrence of the executive of the State and the Secretary of the Interior, and there is nothing to impeach the *bona fides* of all concerned in that selection. There was nothing unusual or wrong in the canal Co. being active in selecting the lands; that was reasonable and proper. The lands which might otherwise have been selected and were valuable are now in great measure sold or appropriated.

The defendant, who is a mere intruder, entirely without right or any possible way of obtaining any upon his own theory, asks
65 the court to hold that what has been done is utterly void and gives the plaintiff no title whatever. This he asks, not to protect any interest of his own, but when the consequence of such holding is to overturn the foundations on which the titles of a large number of purchasers in good faith are supported. The theory of his defense is that the title to the land sued for remained in the State of Michigan and at the date of the commencement of suit was still lodged there, but he could not set up a title in the State if the State itself could not in case it were litigating.

And in my opinion the State could not have asserted a title to these lands. The inclination of my judgment is to hold that the proceedings were intrinsically sufficient to revest the legal title to these lands in the United States. But be that as it may, the State should be held concluded by its concurrence in the proceedings intended to vest the title in the canal Co. It would be permitting the State to commit a gross fraud if it be not concluded. The obligations of legal morality rest certainly with as much weight upon the State as upon private individuals. This principle was applied to a municipality in the case of Carondolet *vs.* St. Louis, 1 Black, 179, 191; to a county in Calhoun *vs.* Emigrant Company, 93 U. S., 124; to a State in Commonwealth *vs.* Andre, 3 Pick., 224. It was justly said in Woodruff *vs.* Trapnall, 10 How., 190, 207, by the court in delivering judgment that we naturally look to the action of a sovereign State to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals; and there are other cases where the Supreme Court has laid stress upon such circumstance when considering public action in regard to titles and property rights. In dealing with these it does not seem to me that a State can be regarded as merely a mechanical organization and its action in such matters be treated as

unaffected by obligations which elsewhere bind the conscience. The principle has been asserted and applied in several cases in the circuit courts of the United States.

Cahn *vs.* Barnes, 5 Fed. Rep., 327.
Hough *vs.* Buchanan, 27 Fed. Rep., 328.
Pengra *vs.* Munz, 29 Fed. Rep., 830.

Reference is not made here to that species of estoppel which is put upon one who by untrue assertion misleads another to his prejudice, but to that which precludes one from taking inconsistent positions where, having taken one by which he has benefited at the expense of another, he is not permitted to repudiate that and take an-
66 other inconsistent position to the prejudice of that other. In this kind of estoppel it is not necessary that there should have been either false representation or misleading.

The fraud is committed by the party being permitted to retrace his course and stand on the other ground.

Danieals *vs.* Tearney, 102 U. S., 415, and cases cited.

And this defense would be a good one if the State were a plaintiff in ejectment suing for this land which had thus been appropriated by her own act.

Dickerson *vs.* Colegrove, 100 U. S., 578.
Baker *vs.* Humphrey, 101 U. S., 494.
Kirk *vs.* Hamilton, 102 U. S., 68.

In regard to the letter of Governor Bagley repudiating the official action of Governor Baldwin, it seems to me little need be said. In the writing of that letter he was not in the exercise of any duty conferred upon him by the Constitution or laws of the State or of the United States. His predecessor, in selecting these lands for the canal Co., was.

Governor Bagley himself, at a later date, executed the certificate of completion to the canal Co. in the exercise of his proper official function. I think it can hardly be said that this was intended by the law and by the official to operate merely as denoting that the work was done. The language of the 4th sect. of the act of the Legislature of March 18th, 1865, as well as the language of the certificate itself, seems to imply that it was intended to operate as the conveyance of title in the selected lands to the canal Co. This seems to have been the view taken by the supreme court of Michigan in Sutherland *vs.* The Governor, 29 Mich., 320, 322, and I think correctly. No other mode of transferring the legal title to the canal Co. was provided by the law.

Again, it seems to me that the courts should not measure the action of great organizations, like the State and the General Government, by the square and compass of technical law, which, though well fitted to the measure and determination of private conduct and controversies, might work confusion if applied to great
67 public transactions occurring in the past and in reliance upon the validity of which many private rights have been founded;

and legal doctrines which might have unquestioned applicability to a simple state of facts must often yield to impinging rules of paramount importance, where, other circumstances concurring, the latter ought in the soundest reason to be applied. In the case of Doolan *vs.* Carr, 125 U. S., which is much relied upon by counsel for the defendant, the circumstances were materially different from those here presented. The defendants in that case were in possession under a claim of right, which they were asserting to obtain the title to the land by the means which the law gave them. It mattered not that this right had been for the time wrongfully denied to them. If, as they offered to prove, the land was subject to entry the denial would not finally decide their right. They therefore had a standing which enabled them to raise the question of the validity of the plaintiff's title. In view of other decisions of the supreme court, it seems likely that this fact must have influenced the ruling in that case. Here the defendant had no right to enter in any view of the situation. If the title was in the United States it was by virtue of proceedings which rendered it exposed to the selection of the canal Co.; if it was in the State the latter was not authorized to grant it to him.

But, besides this, and, as it seems to me, of still greater importance, there was in that case no such reciprocal public action as took place here, and no such extensive private rights had been acquired upon its assumed validity. The case presented the simple grounds for the application of the doctrine there stated.

Instances abound in the law where a matter of doubtful coherence becomes solid under the pressure of supervening events; and
68 cases often arise where the maxim *quod fieri non debet fractum valet* applies, and I think this is such a one, even if it be conceded that the action of the Governor and the land department was based upon a mistaken construction of the acts of Congress.

For these reasons I think the defendant was not entitled to prevail with this defense, and that the result of the trial was the proper one.

Filed March 1st, 1890.

CHAS. L. FITCH, *Clerk.*

[Endorsed:] Canal Co. *vs.* Cunningham.

69 (*Direction for New Trial.*)

The Circuit Court *for* the United States for the Western District of Michigan, Northern Div.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER A. CUNNINGHAM.

To the clerk:

*I* motion for a new trial having been made in the above cause in behalf of the defendant, the circuit judge, at my request sat with me upon the argument thereon, and we were assisted by the district judge of the eastern district of Michigan, who was present at the hearing.

The circuit judge is of opinion that a new trial should be granted. My own opinion is otherwise. But the circuit judge having at the request of — the hearing of the motion, his views should prevail, and a new trial will accordingly be ordered.

The opinions of the judges upon the questions involved in the motion will be filed.

March 1st, 1890.

HENRY F. SEVERENS,
*District Judge.*

Filed March 1st, 1890.

C. L. FITCH, *Clerk.*

70 At a session of the United States circuit court for the sixth circuit and western district of Michigan *for the sixth circuit and western district of Michigan*, northern division, continued and held at the United States court-rooms, at the city of Marquette, in said district and division, on Wednesday, the seventh day of May, A. D. one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

Present: Hon. Henry F. Severens, district judge.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER CUNNINGHAM.

A motion having been made in this cause to set aside the verdict and judgment heretofore entered and to grant a new trial therein, and the same having been argued by the counsel for said parties before the Hon. Howell E. Jackson, circuit judge, and the Hon. Henry F. Severens, district judge, at the city of Detroit;

And said judges, after considering the matter, having made and filed with the clerk of this court an order directing that said motion be granted, therefore it is ordered by the court now here that the verdict and judgment heretofore entered in this cause be, and the same are hereby, vacated and set aside, and that a new trial be granted therein.

71 At an adjourned session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, continued and held at the United States court-rooms, in the city of Marquette, in said district and division, on Wednesday, the twenty-third day of July, A. D. one thousand eight hundred and ninety, and of the year of Independence the one hundred fifteenth.

Present: Hon. Henry F. Severens, U. S. dist. judge.

Present also: Hon. George R. Sage, U. S. dist. judge, southern dist. of Ohio.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
MICHAEL DONAHOE,

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER CUNNINGHAM,

and

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
HUGH FINAN.

The parties in these causes being in court and ready for trial, and it being stipulated in open court by the attorneys for the respective parties that the three causes above entitled should be tried by the same jury, *and* at the same time thereupon came a jury, to wit, William J. Reckard, August Mette, Donald Sinclair, George S. Naughton, Anthony Fredericks, William J. Morse, William P. Homback, F. C. Nowack, John Wahleman, Robert Ivey, Thomas
72 Tracy, and Frank Greenwald, good and lawful men, who, being duly impannelled, tried, and sworn to well and truly *to* try the issue between the parties in each of the above-entitled causes, sat together and heard the evidence this day adduced.

And upon application and by consent of all parties in above causes it is ordered that Silas W. Goodale be, and is hereby, appointed reporter in this cause, and that a transcript of his stenographic notes shall constitute the official record of the testimony taken in these causes.

Court adjourned to July 24, 9.30 a. m.

73 UNITED STATES OF AMERICA:

Adjourned May Term, A. D. 1890.

THURSDAY, *July* 24, 1890.

Court met pursuant to adjournment.
Present: Hon. H. F. Severens, U. S. dist. judge.
Present also: George R. Sage, U. S. dist. judge.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
MICHAEL DONAHOE.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER CUNNINGHAM.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
HUGH FINAN.

The jury heretofore duly impannelled, tried, and sworn in the above causes sat together and heard the evidence this day adduced.

The court adjourned until July 25, 9 a. m.

74 FRIDAY, *July* 25, 1890.

Court met pursuant to adjournment.

Present: Hon. H. F. Severens, } U. S. dist. judges.
Present: Hon. Geo. R. Sage, }

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
MICHAEL DONAHOE.

SAME
*vs.*
WALTER CUNNINGHAM.

SAME
*vs.*
HUGH FINAN.

The jury heretofore duly impannelled, tried, and sworn in this cause sat together and heard the conclusion of the evidence and the arguments of counsel.

The court adjourned until July 26, at 9.30 a. m.

75 UNITED STATES OF AMERICA:

Adjourned May Term, A. D. 1890.

SATURDAY, *July* 26, 1890.

Court met pursuant to adjournment.

Present: Hon. Henry F. Severens, } U. S. dist. judges.
Present: Hon. George R. Sage, }

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER CUNNINGHAM.

The jury heretofore duly impannelled, tried, and sworn in this cause sat together and heard the conclusion of the arguments of counsel, and under instructions from the court, and without leaving their panel, say upon their oath that the said defendant is not guilty of unlawfully withholding the lands and premises as described in the plaintiff's declaration, and on motion of plaintiff, and by consent of defendant, it is ordered that three months be allowed the plaintiff to prepare and present for signature a bill of exceptions in this cause, and that all further proceedings therein be stayed until expiration of that time.

And it is further ordered that the said parties, plaintiff and defendant, refrain from committing any waste by cutting timbers or otherwise during the period aforesaid, and if this cause shall be removed to the Supreme Court, then until the decision thereof, unless otherwise ordered by this court or a judge thereof.

76 (*Opinion and Charge of Court.*)

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER CUNNINGHAM.

SAME
*vs.*
MICHAEL DONAHOE.

SAME
*vs.*
HUGH FINAN.

In the Cunningham case it would be unprofitable to restate our own views upon the principal questions. The court is constrained by the obligations of judicial decorum to hold that the release of the title to the clear lands on the Ontonagon and State Line road, in which this tract was situated, executed by the Chicago and Northwestern Railway Company and by the Governor of the State of Michigan to the United States, was unauthorized by law, and the selection of such lands for the canal company and the certification thereof by the Secretary of the Interior were void.

If this land was confirmed to the present canal company by the act of 1889, while it might relate back to the date of selection for some purpose, it would not do so for the purpose of maintaining an action brought in the meantime. To sustain the action of ejectment the plaintiff must have had title at the commencement of the suit, and if it had not then a title it cannot succeed upon a
77 right substantially perfected.

The verdict in that case must, therefore, be for the defendant.

In the Donahoe case the land lies in the common limits of the Marquette and State Line and the Ontonagon and State Line Branches. It may be that the release by the Peninsula Railroad Company did not operate to release these lands or a moiety thereof, but the first release of the Chicago and Northwestern Railway Company and the first release by the Governor surrendered all the lands in those common limits. This action was never repudiated by the State nor, so far as appears, ever questioned. The land department has since acted upon the validity of that surrender, and we think its validity cannot be questioned by the defendant in this suit. This land was selected for the canal company. The selection was approved by the Secretary of the Interior and the land certified by him to the canal company.

In that case the verdict must be for the plaintiff.

In the Finan case the land, as in the Cunningham case, is in the clear limits of the Ontonagon and State Line Branch.

The title stands in the same plight as in the Cunningham case, but the suit was commenced since the act of March 2nd, 1889, was passed, and it becomes necessary to decide whether the 3rd section of that act operated to confirm the title of the canal company to the land in question.

If it were not for the express mention of the claims of the canal company in section 2 we should be prepared to hold upon the liberal construction which should be given to statutes of this character, that the title of the plaintiff was confirmed by the provisions of section 3.

78 It is hard to understand why Congress should have excluded one party from the scope of the justice which it was endeavoring to secure to those who had purchased the forfeited lands for value, under cover of lawful authority, supposing they were acquiring a valid title, and have laid the scourge upon that one.

But it is a question of construction, and my brother Sage is of opinion that the specific mention of the canal company's claims in section 2 brings the subject under the rule which excludes the particular matter from the operation of the general provision; and, while I have serious doubt whether the claim of the canal company in respect to these lands is so specifically dealt with and disposed of by the 2nd section as to exclude it from the equity generally accorded by section 3 to all persons coming within the conditions there mentioned, I shall, with considerable hesitation however, concur in this construction.

This conclusion leaves this case exposed to the opinion of the circuit judge in the Cunningham case, and there must be a verdict for the defendant in this case also.

July 26, 1890.

H. F. SEVERENS, *Judge.*

I concur.

GEO. R. SAGE, *Judge.*

Filed July 26, 1890.

F. M. MOORE, *Dep. Clerk.*

(Here follow maps marked pp. 79 & 80.)

81 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Northern Division of the Western District of Michigan.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
WALTER A. CUNNINGHAM.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
*vs.*
HUGH FINAN.

At a session of said court held at the court-room of said court, in the city of Marquette, in said district, on the twenty-third day of July, A. D. 1890, before the Honorable Henry F. Severens, district judge of said western district of Michigan, presiding, and the Honorable George R. Sage, district judge of the southern district of Ohio, associated with said presiding judge, sitting as circuit judges, the issues joined between the parties to the two above-entitled causes came on to be tried by a jury of said district for that purpose duly impaneled, at which day came the said plaintiff and the said defendants, by their respective attorneys, and the jurors of the jury aforesaid, who were then and there duly sworn to try the issues aforesaid, said causes, by agreement of parties in open court and by order of the court, being brought on for trial at the same time and before the same jury, together with a certain other action of ejectment between said plaintiff as plaintiff and one Michael Donahoe as defendant.

And the said plaintiff's counsel, to maintain and prove the issue on the part of the plaintiff, introduced and read in evidence a certified copy from the General Land Office of the United
82 States of supplemental list No. 4 of lands selected by the agent of the State of Michigan in the district of lands subject to sale at Marquette, granted to the State of Michigan by act of Congress approved July 3rd, 1866, which list contained the description of 23,398.14 acres of land in odd-numbered sections in the Upper Peninsula of Michigan, and the following is a copy of said list, together with the caption, certificates, and approval thereof except that the descriptions of land, no part of which were involved in these suits, are omitted from the following copy, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 17th*, 1889.

I, W. M. Stone, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of supplemental list No. 4 of lands selected in the State of Michigan under the act of Congress of July 3, 1866, and approved May 22, 1871, as a portion to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, is a true and literal exemplification of the original approved list now on file in this office.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

W. M. STONE,
*Acting Commissioner of the General Land Office.*

Supplemental list No. 4. Approved May 22, 1871.
Certified copies sent to Governor, land officers, and Hon. P. J. Avery June 10th, 1871. Approval posted M'ch 28, 1873.

KREIDLER, *B. K.*

83 Supplemental list of lands selected by the agent of the State of Michigan in the district of lands subject to sale at Marquette and granted to the State of Michigan by the act of Congress approved the 3rd of July, 1866, entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," being the vacant and unappropriated lands designated by odd numbers nearest the location of said canal.

North of base line and west of principal meridian, Michigan.

Portage Lake and Lake Superior ship canal.

Marquette district.

Act July 3rd, 1866. Statutes, vol. 14, p. 81.

| Parts of section. | Section. | Township. | Range. | Acres. |
|---|---|---|---|---|
| E. ½ of N. W. ¼ | 13 | 44 | 36 | 600.00 |
| S. W. ¼ of N. W. ¼ | " | " | " | |
| S. W. ¼ of | " | " | " | |
| All of sec. | 25 | " | " | 640.00 |

GENERAL LAND OFFICE, *May* 19, 1871.

This list has been carefully examined with the records of this office, found free from conflict, and inuring to the State of Michigan for the purpose indicated.

W. K. MENDENHALL.
THOS. CROMWELL.

GENERAL LAND OFFICE, *May* 19*th*, 1871.

I, W. W. Curtis, acting Commissioner of the General Land Office, do hereby certify that the foregoing on pages one to four, inclusive, is a true and correct list of the tracts of land granted to the
84 State of Michigan by the act of Congress approved the 3rd day of July, 1866, entitled "An act granting lands to the

State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," being the vacant lands designated by odd numbers, not otherwise appropriated, in the district of lands subject to sale at Marquette, in the Upper Peninsula, and selected nearest the location of said canal.

I respectfully recommend that the same be approved subject to any valid interfering rights which may have existed at the date of selection.

[SEAL.] In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first hereinabove written.

W. W. CURTIS,
*Act'g Commissioner.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON CITY, D. C., 22*d May*, 1871.

Approved subject to the conditions and rights above mentioned.
C. DELANO, *Secretary.*

Said plaintiff's counsel further offered and read in evidence a transcript of the articles of incorporation of the Portage Lake and Lake Superior Ship Canal Company, duly certified from the office of the secretary of state of the State of Michigan, showing the due incorporation of said company on the 15th day of July, A. D. 1864, under and in accordance with the act of the Legislature of the State
85 of Michigan entitled "An act to provide for the formation of companies to construct canals or harbors and improve the same," approved March 13th, A. D. 1861; and also a transcript of amended articles of said corporation, duly certified from the office of the secretary of state of the State of Michigan, by which amended articles on the 29th day of April, A. D. 1871, the name of said corporation was changed to the "Lake Superior Ship Canal, Railroad and Iron Company."

Said plaintiff's counsel further offered and read in evidence a transcript of the articles of incorporation of the Lake Superior Ship Canal, Railway and Iron Company, duly certified from the office of the secretary of state of the State of Michigan, of which the following is a copy:

*Articles of Association of the Lake Superior Ship Canal, Railway and Iron Company.*

Articles of association made and formed the fourteenth day of May, A. D. 1877, under and in pursuance of an act of the Legislature of the State of Michigan entitled "An act to provide for the formation of companies to construct canals or harbors and improve the same," approved March 13, A. D. 1861, and the several acts amendatory thereof or supplementary thereto since passed and not yet repealed; and also under and in pursuance of and in compli-

ance with the provisions of an act entitled "An act to provide for the incorporation of railroad companies," approved February 12th, A. D. 1855, and the several acts amendatory thereof or supplementary thereto since passed and not yet repealed; and also under and in pursuance of and in compliance with the provisions of an
86 act entitled "An act to amend chapter one hundred and thirty of the compiled laws of one thousand eight hundred and seventy-one, entitled 'general provisions relating to corporations,' by adding a new section thereto relative to mortgages of franchises:"

And this company is formed by a compliance with all the terms, provisions, and conditions of the three acts aforesaid and the several acts amendatory of or supplementary to them now in force, and claims all the rights, privileges, franchises, and immunities conferred by the said acts and heretofore held by the "Lake Superior Ship Canal, Railroad and Iron Company," a corporation heretofore existing under said first two acts above named, and the corporation here formed is the successor corporation to said last-named original corporation, the first two corporators herein being the purchasers under mortgage sale of all the corporate property and franchises of said original corporation, and the remaining five corporators being associated with them pursuant to the terms of said last-named act.

Article I.

The name of this corporation shall be Lake Superior Ship Canal, Railway and Iron Company.

Article II.

The said corporation hereby formed under the articles of association of the same, severally subscribed to by the undersigned, shall exist and continue to enjoy the franchises and powers of a body corporate for the period of nine hundred and ninety-nine years from the fourteenth day of May, A. D. 1877.

Article III.

The capital stock of this company shall be divided into eighty thousand shares of one hundred dollars each, and shall be in the aggregate eight millions of dollars ($8,000,000).

87 Article IV.

The number of directors of this company shall be seven (7).

Article V.

The directors elected to hold their offices for the first year in pursuance of the above-entitled acts are Albon P. Man, Nathaniel Wilson, Gordon Norrie, Schuyler F. Seager, Theodore M. Davis, George W. De Bevoise, and Don M. Dickinson.

## Article VI.

The Lake Superior Ship Canal, Railway and Iron Company is organized to own and operate the ship canal through the isthmus or neck of land which lies between Portage Lake and Lake Superior, separating the waters of the two lakes at that place, which ship canal extends from the head of Portage Lake to and into Lake Superior, the length of which canal, as near as may be, is three miles, and also to improve the navigation of Portage Lake by the construction of canals through points of land, opening, deepening, and straightening the channels thereof, the purpose being to facilitate transportation through said lake and river and to open a channel for the commerce of Lake Superior from Keweenaw Bay through the canal and river to Portage Lake, through said lake to the head thereof, and through said ship canal to Lake Superior, the intention being also to use, occupy, and employ the existing canals and receive tolls thereon and to enjoy all the privileges pertaining to the same under the laws of this State, said canals and improvements together being about thirty miles in length.

## Article VII.

The Lake Superior Ship Canal, Railway and Iron Company is also organized to construct, operate, manage, maintain, and use a railroad from the iron mines known as the Menominee iron
88 belt or Menominee iron region through, by some feasible and practical route, to some point on Green Bay or to a junction and connection with some branch railroad or the main track thereof of the Chicago and Northwestern railroad extending to Green Bay, not exceeding forty-five miles in length, and said railroad to be built, constructed, maintained, used, and operated in conformity to the provisions of the acts above referred to and in accordance with the provisions of the general railroad laws of the State of Michigan.

## Article VIII.

The stockholders and directors shall be invested with all the powers, rights, privileges, and immunities which are conferred upon such corporations by the several acts by virtue of which this body politic is formed.

## Article IX.

The board of managers or directors provided for by the laws under which this corporation is formed shall have all the powers and rights conferred by the laws or acts last aforesaid and by the by-laws of this company adopted in pursuance of the provisions of said laws.

In witness whereof the parties hereto and stockholders in the said corporation have hereto set their hands and seals this fourteenth day of May, eighteen hundred and seventy-seven, and authorize and direct that the same shall be filed in the office of the secretary

of state for the State of Michigan and at any other office required by law.

Dated at the city of Detroit, in the State of Michigan, in the United States of America, this fourteenth day of May, A. D. eighteen hundred and seventy-seven.

89

ALBON P. MAN.
NATHANIEL WILSON.
G. NORRIE.
SCHUYLER F. SEAGER.
THEO. M. DAVIS.
GEO. W. DE BEVOISE.
DON M. DICKINSON.

STATE OF MICHIGAN, } ss:
*County of Wayne,* }

On this fourteenth day of May, A. D. 1877, before me, a notary public in and for said county, personally came the above and within named Albon P. Man, Nathaniel Wilson, Gordon Norrie, Schuyler F. Seager, Theodore M. Davis, George W. De Bovoise, and Don M. Dickinson, known to be the same persons named in and who executed the foregoing articles of association, and severally acknowledged that they executed the same for the purposes therein mentioned as their free act and deed.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, at the city of Detroit, in the county of Wayne, in the State of Michigan, one of the United States of America.

[SEAL.]

HENRY RUSSEL,
*Notary Public in and for the County of Wayne and State of Michigan.*

STATE OF MICHIGAN ss:

OFFICE OF THE SECRETARY OF STATE.

I, William Jenney, secretary of state of the State of Mich-
90 igan, do hereby certify that I have compared the annexed copy of articles of association of the Lake Superior Ship Canal, Railway and Iron Company with the original filed in this office May 15th, 1877, and that it is a true and correct transcript therefrom and of the whole of such original.

In testimony whereof I have hereunto set my hand and affixed
[SEAL.] the great seal of the State of Michigan, at Lansing, this tenth day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

WM. JENNEY,
*Secretary of State.*

Said plaintiff's counsel further offered and read in evidence a transcript of amended articles of association of the Lake Superior Ship Canal, Railway and Iron Company, duly certified from the office of the secretary of state of the State of Michigan, of which the following is a copy:

*Amended Articles of Association of the Lake Superior Ship Canal, Railway and Iron Company, a Corporation Duly Existing under the Laws of the State of Michigan.*

A meeting of the board of directors of the Lake Superior Ship Canal, Railway and Iron Company was held in the city of Detroit, in the State of Michigan, on the fourteenth day of May, eighteen hundred and seventy-eight, for the purpose of amending the articles of association of said company, pursuant to due notice according to law; and thereupon the following resolution was adopted, directors voting therefor:

Resolved, That the articles of association of the Lake Superior Ship Canal, Railway and Iron Company filed in the
91 office of the secretary of state of the State of Michigan on the fifteenth day of May, eighteen hundred and seventy-seven, be, and the same hereby are, amended so as to read as hereinafter contained.

And a meeting of the stockholders of the Lake Superior Ship Canal, Railway and Iron Company was also held in the city of Detroit, in the State of Michigan, on the fourteenth day of May, eighteen hundred and seventy-eight, for the purpose of amending the articles of association of said company, pursuant to due notice, according to law, at which meeting there were present stockholders of said company representing forty thousand shares of stock in said company, the whole amount theretofore issued being forty thousand shares; and thereupon the following resolution was adopted, stockholders representing forty thousand shares of said stock voting in favor of it:

Resolved, That the articles of association of the Lake Superior Ship Canal, Railway and Iron Company filed in the office of the secretary of state of the State of Michigan on the fifteenth day of May, eighteen hundred and seventy-seven, be, and the same hereby are, amended so as to read as follows.

And to each of said resolutions there was attached the form of a certificate in the words and figures following, and which certificate is accordingly hereby adopted—that is to say:

Amended articles of association made and formed the fourteenth day of May, A. D. eighteen hundred and seventy-eight, under and in pursuance of an act of the Legislature of the State of Michigan entitled "An act to provide for the formation of companies to construct canals and harbors and improve the same," approved March 13th, A. D.
1861, and the several acts amendatory thereof or supplement-
92 ary thereto since passed and not yet repealed, and also under and in pursuance of and in compliance with the provisions of an act of the Legislature of the same State, approved March 29th, A. D. 1872, entitled "An act to amend chapter one hundred and thirty of the compiled laws of one thousand eight hundred and seventy-one, entitled 'general provisions relating to corporations,' by adding a new section thereto relative to mortgages of franchises."

And this company is formed by a compliance with all the terms, provisions, and conditions of the acts aforesaid and the several acts amendatory of or supplementary to them now in force, and it claims all the rights, privileges, franchises, and immunities conferred by the said acts and heretofore held by the Lake Superior Ship-Canal, Railroad and Iron Company or its predecessor, the Portage Lake and Lake Superior Ship Canal Company, corporations heretofore existing under the acts above named, together with all the property of the same; and the corporation hereby formed or whose articles are hereby amended is the successor corporation to said last-named original corporations, the first two corporators herein named being the purchasers under mortgage sale of all the corporate property and franchises of said original corporations, and the remaining five corporators being associated with them, pursuant to the terms of said last-named act, and also under and in pursuance of and in compliance with a resolution adopted on the fourteenth day of May, eighteen hundred and seventy-eight, by the board of directors of the Lake Superior Ship Canal, Railway and Iron Company, duly convened. and also under and in pursuance of and in compliance with a resolution adopted on the fourteenth day of May, eighteen hundred and seventy-eight, by the stockholders of the Lake
93 Superior Ship Canal, Railway and Iron Company in legal meeting duly convened, as heretofore set forth.

Article I.

The name of this corporation shall be "The Lake Superior Ship Canal, Railway and Iron Company."

Article II.

The said corporation hereby formed under the articles of association of the same, severally subscribed to by the undersigned, shall exist and continue to enjoy the franchises and powers of a body corporate for the period of eighty-six (86) years from the fourteenth day of May, A. D. eighteen hundred and seventy-seven (1877).

Article III.

The capital stock of this company shall be divided into forty thousand shares of one hundred dollars each, and shall be in the aggregate four millions of dollars ($4,000,000).

Article IV.

The number of directors of this company shall be seven (7).

Article V.

The directors elected to hold their office for the first year next ensuing, in pursuance of the above-entitled acts (and under these amended articles), are Albon P. Man, Nathaniel Wilson, Benjamin Dean, Theodore M. Davis, Frederick Ayer, Don M. Dickinson, and Gordon Norrie.

Article VI.

The Lake Superior Ship Canal, Railway and Iron Company is organized to own and operate the ship canal through the isthmus or neck of land which lies between Portage Lake and Lake Superior, separating the waters of the two lakes at that place, which ship canal extends from the head of Portage Lake to and into Lake Su-
94 perior, the length of which canal, as near as may be, is three miles, and also to improve the navigation of Portage Lake and its tributaries and the Portage river by the construction of canals through points of land, opening, deepening, and straightening the channels thereof, the purpose being to facilitate the transportation through said lake and river and to open a channel for the commerce of Lake Superior from Keweenaw Bay, through the canal and river, to Portage Lake, through said lake to the head thereof, and through said ship canal to Lake Superior, the intention being also to use, occupy, and employ the existing canals and receive tolls thereon and to enjoy all the privileges pertaining to the same under the laws of this State, said canal and improvements together being about thirty miles in length.

Article VII.

The stockholders and directors shall be invested with all the powers, rights, privileges, and immunities which are conferred upon such corporations by the several acts by virtue of which this body politic is formed.

Article VIII.

The board of managers or directors provided for by the laws under which this corporation is formed shall have all the powers and rights conferred by the laws or acts last aforesaid and by the by-laws of this company adopted or which may be adopted in pursuance of the provisions of said laws.

And now we, the said company, and also the undersigned officers, directors, and stockholders of said company, to wit, the Lake Superior Ship Canal, Railway and Iron Company, in pursuance of the aforesaid resolutions, do hereby sign, seal, and execute the foregoing amended articles of association, as witness the corporate seal
95 of said company and the signatures of its president and secretary, and also the hands and seals of the directors and stockholders of said company, hereto affixed this fourteenth day of May, eighteen hundred and seventy-eight, and we hereby authorize and direct the same to be filed in the office of the secretary of state for the State of Michigan and in any other office, if any there be, in which the same are by the law required to be filed.

[L. S.] THEO. M. DAVIS, *President.*

S. F. SEAGER,
*Secretary pro tem.*

| Names. | Residence. | Number of shares. |
|---|---|---|
| Albon P. Man | New York | 10. |
| Nath'l Wilson | Washington, D. C. | 8,387.74 |
| Schuyler F. Seager | Lansing, Mich. | No. — |
| Theo. M. Davis | New York | 5,315.05 |
| G. Norris | Do. | 9,287.03 |
| Don M. Dickinson | Detroit, Mich. | 4,000.00 |
| Albon P. Man, New York; Nath'l Wilson, Washington, D. C., Trustees for J. C. Ayer | | 8,405.18 |
| for Frederick Ayer | | 4,203. |
| & for Albert G. Coook | | 392. |
| All of Lowell, Mass. | | |

STATE OF MICHIGAN, } *ss:*
*County of Wayne,* }

On this fourteenth day of May, eighteen hundred and seventy-eight, before me, a notary public in and for said county,
96 personally came Albon P. Man, Nathaniel Wilson, individually and also as trustees for J. C. Ayer, Frederick Ayer, and Albert G. Cook; also Theodore M. Davis, Gordon Norrie, and Don M. Dickinson and Schuyler F. Seager, all known to me to be the same persons named — and who executed the foregoing articles of association, and they severally acknowledged that they executed the same for the purposes therein mentioned and as their free act and deed; and at the same time before me also came Theodore M. Davis, known to me to be the president of said existing corporation, the Lake Superior Ship Canal, Railway and Iron Company, and Schuyler F. Seager, known to me to be the secretary of said company, and they, being duly sworn, did depose and say that the seal attached to the preceding certificate is the corporate seal of the said corporation and was attached thereto by authority of said corporation, and that they, by like authority, also signed their names thereto as such president and secretary.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, at the city of Detroit, in the county of Wayne, in the State of Michigan.

SAMUEL J. KELSO,
[SEAL.] *Notary Public, Wayne County, Michigan.*

STATE OF MICHIGAN, *ss:*

OFFICE OF THE SECRETARY OF STATE.

I, William Jenney, secretary of state of the State of Michigan, do hereby certify that I have compared the annexed copy of amended articles of association of the Lake Superior Ship Canal, Railway and Iron Company with the original filed in this office May 18th,
97 1878, and that it is a true and correct transcript therefrom and of the whole of such original.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the great seal of Michigan, at Lansing, this 11th day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

WM. JENNEY,
*Secretary of State.*

Said plaintiff's counsel further introduced in evidence a transcript of the record of a certain cause (which was admitted by defendants' counsel to be a correct transcript thereof) formerly pending and determined in the circuit court of the United States for the eastern district of Michigan, in equity, wherein Thomas N. McCarter, trustee, a citizen of the State of New Jersey, was complainant, and The Lake Superior Ship Canal, Railroad and Iron Company, a citizen of the State of Michigan; The Union Trust Company, a citizen of the State of New York, and George Jerome and Fernando C. Beaman, citizens of the State of Michigan, as assignees in bankruptcy of the Lake Superior Ship Canal, Railroad and Iron Company, were defendants. Said cause was commenced by bill filed in said court by said complainant on the third day of July, A. D. 1872, for the purpose of foreclosing a mortgage upon the lands, land grants, and other property of said Lake Superior Ship Canal, Railroad and Iron Company, which mortgage is described in the decree of said court rendered in said cause hereinafter set forth. Said record contained
98 the deposition of George S. Frost, referred to in said decree hereinafter set forth, and attached to and as exhibits and forming a part of said deposition were lists of lands selected by the agent of the State of Michigan, certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior, containing descriptions of two hundred thousand acres of land selected under and in accordance with the act of Congress approved March 3rd, 1865, entitled "An act granting land to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior," and two hundred thousand acres of land selected, certified, and approved as aforesaid under and in accordance with an act of Congress approved July 3rd, 1866, entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," all of which lands were situated in the Upper Peninsula of Michigan. Among said lists was the list of lands approved by the Secretary of the Interior May 22, 1871, a copy of which (omitting descriptions of lands not involved in these suits) is hereinfore set forth and designated "supplemental list No. 4." All said lists were certified and approved in like manner as the list hereinbefore set forth.

It was conceded on the part of the defendants that such proceedings were had in said circuit court of the United States for the eastern district of Michigan in the suit aforesaid as to give said court jurisdiction to proceed to hear said cause and to make the decree thereon contained in said record and hereinafter set forth.

And it was also admitted on the part of said defendants that all the statements of fact contained in said decree are true.

99 The decree made by said court in said foreclosure suit which formed a part of said record so introduced in evidence was as follows:

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held at the district court room, in the city of Detroit, on Monday, the fifteenth day of June, A. D. eighteen hundred and seventy-four.

Present: Hon. Noah H. Swayne, associate justice of the supreme court; Hon. John W. Longyear, district judge.

In the cause between—

THOMAS N. McCARTER, Trustee, Complainant,
*vs.*
THE LAKE SUPERIOR SHIP CANAL, RAILROAD AND Iron Company, The Union Trust Company of New York, George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of the Lake Superior Ship Canal, Railroad and Iron Company, Bankrupt, Defendants. } In Equity.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz:

1st. That the said The Lake Superior Ship Canal, Railroad and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Canal Company, did duly authorize the issue of and did issue the series of bonds which are set forth in the bill herein, namely, twelve hundred and fifty (1,250) bonds, numbered from one to 1250, inclusive, each for one thousand dollars ($1,000), and each payable at the Ocean National Bank, in New York, on the first day of July, 1871, bearing date the first day of July, 1870, and bearing interest at the rate of seven per cent. per annum, payable

100 half yearly on the first day of each month of January and July, A. D. 1871, according to interest warrants thereto respectively attached.

2d. Also that the said company did duly authorize the execution of and did duly execute and deliver, as set forth in said bill, the mortgage which is therein fully set forth and described, said mortgage bearing date the first day of July, A. D. 1870, and duly executed by the officers of said company under the seal thereof, and the execution thereof duly proved and acknowledged so as to entitle the same to be recorded under and pursuant to the laws of the State of Michigan, and that the said mortgage was duly recorded in the following counties and at the following dates—that is to say: In the county of Houghton on the 9th day of August, A. D. 1870; in the county of Keweenaw on the tenth day of August, A. D. 1870; in the county of Marquette on the seventeenth day of August, A. D. 1870; in the county of Ontonagon on the thirteenth day of August, A. D. 1870; in the county of Menominee on the eighteenth day of

August, 1870, and in the county of Delta on the seventeenth day of August, 1870, and that the said mortgage was intended to secure and does secure the series of bonds described therein, and which was issued as aforesaid.

3d. That the said mortgage was also executed by Charles L. Frost, predecessor of the complainant herein, as trustee, on the first day of the same month of July, A. D. 1870, and that said Charles L. Frost on the first day of July, A. D. 1872, resigned his trusteeship, by an instrument under his hand and seal, duly recorded in the counties aforesaid, and that on the second day of the same month of July the complainant was appointed trustee by the Honorable
101 William H. Leonard, a judge of the supreme court of New York, by an instrument under his hand and seal, which was recorded as aforesaid.

4th. That after the execution and delivery of the said mortgage said Portage Lake and Lake Superior Ship Canal Company, on the 29th day of April, A. D. 1871, duly executed "amended articles of association" amending its original "articles of association," under and in pursuance of the provisions of section 2149 (as amended) in chapter 73 of the Compiled Laws of the State of Michigan, entitled "general provisions relating to corporations," — was, amongst other things, to change the name of said company from the "Portage Lake and Lake Superior Ship Canal Company," by which it had before that time been known and designated, to "The Lake Superior Ship Canal, Railroad and Iron Company," by which said title and said company, from and after the said twenty-ninth day of April, A. D. 1871, has been known and designated.

5th. That said mortgage was intended to and did cover and convey the ship canal of said Portage Lake and Lake Superior Ship Canal Company and all its real and personal property, and its four hundred thousand acres of land in the Upper Peninsula of Michigan, received in two grants from the United States and the State of Michigan, expressly subject, however, to two mortgages made by said company, one made to Columbus C. Douglass, as trustee, the first day of July, 1865, and conveying the canal franchises and the two hundred thousand acres granted by act of Congress March third, 1865, which mortgage secured an issue of one thousand bonds of five hundred dollars ($500) each, all of which have been issued, negotiated, and used by said ship canal company and the principal of which remains unpaid, and the other made to D. Randolph Martin and Thomas T. Davis, as trustees, on the first day of July,
102 1868, and conveying the said canal franchises and the two hundred thousand acres of land granted by act of Congress of July 3rd, 1866, which other mortgage secured an issue of five hundred bonds of one thousand dollars ($1,000) each, all of which have been issued, negotiated, and used by said ship canal company and the principal of which remains unpaid.

6th. That said mortgage which secures said issue of said twelve hundred and fifty bonds upon said canal franchises and four hundred thousand acres of land is also subject to five hundred certificates of indebtedness of one thousand dollars ($1,000) each,

issued by Isaac H. Knox, receiver, for the purpose of finishing said canal, by order of this court in a suit of foreclosure therein brought by John L. Sutherland, trustee, successor to said Columbus C. Douglass in his trust, against all parties in interest in all of said property; which said certificates, by order of this court, were made a paramount lien on all of said property, and which said certificates bear date July 1st, 1872, and were payable in one year therefrom, with interest at ten per cent., and the whole amount of principal and interest on which certificates is due and unpaid, and said mortgage which secures said issue of twelve hundred and fifty bonds is a third lien upon said four hundred thousand acres of land and a fourth lien upon the remainder of the property described in said mortgage, to wit, said ship canal and the corporate franchises of said ship canal company and the personal property belonging thereto.

7th. That said Lake Superior Ship Canal, Railroad and Iron Company made default in the payment of the principal of said bonds and the interest coupons thereto attached on the first day of July, A. D. 1871, and that due demand of the same was made
103 by presentation at the place designated for the payment thereof, and the same remain overdue and unpaid, and the said ship canal company remained in default for over thirty days after said last-named day and prior to the beginning of this suit, and that the holders of more than fifty of said issue of bonds did thereafter request said trustee, complainant, to file said bill of foreclosure.

8th. That the Governor of the State of Michigan duly appointed agents, according to law, who selected said four hundred thousand acres of land from the public lands in the Upper Peninsula of Michigan, subject to private entry and not homestead or pre-emption or mineral lands, and that full lists and descriptions of said four hundred thousand acres of land were approved by the Secretary of the Interior and certified to said State according to law, and were deposited and remain of record in the Land Office of the United States at Washington and in the proper office of the State of Michigan, at Lansing, and that true copies of said lists and descriptions of the four hundred thousand acres of land so selected are on file in this cause, attached to the depositions of George T. Frost, who was one of the said State agents, and that said mortgage which secures said issue of twelve hundred and fifty bonds and said Douglass and Martin and Davis mortgages and said receiver's certificates, hereinbefore declared liens in the order of priority hereinbefore set forth upon said four hundred thousand acres of land which are described in said mortgage solely by reference to said acts of Congress and of the State of Michigan and not by parcels, do cover and convey and are valid liens upon each and every parcel of land set forth and described in the aforesaid lists and
104 descriptions of the selections of said four hundred thousand acres, and that said lands lie partly in the eastern and partly in the western districts within the State of Michigan, to wit, said lands in the counties of Delta and Menominee lying in the

western district of Michigan and the remainder in the eastern district.

9th. That on or about the first day of May, A. D. 1871, the said ship canal company executed and acknowledged to the Union Trust Company of New York a mortgage upon all of said mortgaged property, as alleged in the bill, which said mortgage is a lien upon said property and lands junior and subsequent to the said mortgage securing said issue of twelve hundred and fifty bonds.

10th. That the said 1,250 seven per cent. bonds were all issued; that 250 thereof were subsequently retired, leaving one thousand thereof outstanding; that as to eight hundred eighty thereof it is in proof that they are now held by *bona fide* holders for value; that the persons named in Schedule A as holding said bonds, except Harry S. Welles and Henry S. Perkins and another, executors, are absolute owners in good faith for value of the bonds they respectively hold, and the said Henry S. Welles and Henry S. Perkins and another, executors, hold their bonds as collateral to the sums stated as due to them respectively, and which sums constitute the whole and only amount due upon and secured by such collateral bonds; that the several sums due to the several holders of said eight hundred and eighty bonds and interest warrants, as well for principal as for interest, that has accrued and remains unpaid up to the date of this decree, according to the computation made by the court, attached to this decree and made a part hereof, marked (Schedule A), amount to the sum of one million fifty-seven thousand six hundred and eighty-six dollars and thirty-seven cents
105 ($1,057,686.37); that one hundred and twenty other bonds of the same issue, each with two outstanding interest coupons, maturing at the first day of January and July, A. D. 1871, and each of thirty-five dollars ($35), remain outstanding and unpaid, and the holders thereof and the amounts due thereon remain to be ascertained in the manner hereinafter provided.

11th. And it is further ordered, adjudged, and decreed that the said Lake Superior Ship Canal, Railroad and Iron Company or the said George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said The Lake Superior Ship Canal, Railroad and Iron Company, do pay or cause to be paid into the registry of this court for distribution to the bondholders named in Schedule A, *pro rata*, with any amount that may hereafter be found to be due to the holders of the said one hundred and twenty bonds, the amount so computed and decreed to be due said bondholders as aforesaid, together with the interest thereon from the date of this decree and the costs of this suit prior to the sale of said property, as hereinafter provided, and in default thereof that all and singular the said mortgaged ship canal, franchises, personal property, and four hundred thousand acres of land mentioned in the bill of complaint in this cause and hereinafter described be sold at public auction by or under the direction of Addison Mandell, Esquire, a master in chancery of this court, or, in case of his death, absence, or inability to act, by any other master in chancery of this court, and that the sale be made at the front door of the court-house, in the county of Houghton,

in said district, in which county said canal, personal property, and a part of said four hundred thousand acres of land are situated.

106 12th. And it is further ordered, adjudged, and decreed that the said sale be made in the order and manner following, to wit: (1) All and singular the corporate rights and franchises of the said "The Lake Superior Ship Canal, Railroad and Iron Company," formerly known as the "Portage Lake and Lake Superior Ship Canal Company," together with said ship canal, which is hereby declared to be the property essential to the exercise of said corporate rights, shall be deemed an entire thing, and shall be sold as such, separate from any other property mortgaged; (2) that, secondly, at such sale the said mortgaged four hundred thousand acres of land—that is to say, the lands described particularly in the lists and selections aforesaid, true copies of which are filed in this cause—be offered, struck off, and sold as one parcel, subject to the liens of said receiver's certificates, said Douglass mortgage, and said Martin and Davis mortgage, they being prior incumbrances existing in the order hereinbefore stated, and for the sums hereinbefore declared, to wit, fifteen hundred thousand dollars and accrued interest; (3) that, thirdly, at said sale the said personal property be sold in view of the same, where it lies, in said county of Houghton, in said district, and that if it be necessary in order to so sell said personal property the said master may orally adjourn said sale of said personal property to the place or places where said personal property may be in said county, and from day to day or otherwise as may be necessary.

13th. And it is further ordered, adjudged, and decreed that said master give public notice of the time and place of said sale, according to the course and practice of this court, which notice shall set forth the order and manner of said sale according to par-

107 agraph 12 of this decree, and may describe said lands generally as they are described in said mortgage or by quantity and general description as contained in the respective counties, and need not describe them in detail according to the description of parcels as found in said lists of selections on file, and that any of said bondholders or other parties to this suit may become purchasers; that the said master receive from any bondholder who may become a purchaser any of said bonds on account of the purchase-money paid over by said purchaser or any part thereof, but only at such amount in proportion to the sum bid as the aggregate amount of bonds so offered in payment shall bear to the whole 1,000 bonds outstanding of the same issue hereinbefore specified of 1,250 bonds, and provided that the holders of the said collateral bonds shall not be allowed in respect to the same any more in all than the sums actually due thereon as aforesaid, with interest; that the said master execute a deed of said ship canal and franchises to the purchaser or purchasers on the said sale and a deed or deeds to the purchasers of said mortgaged four hundred thousand acres of land, which deed or deeds shall contain the descriptions of the parcels according to said lists of selections on file in this cause and bills of sale to the purchaser or purchasers of said personal property, and that the said

master, out of the proceeds of said sale, pay to the complainant or his solicitor the costs of this suit, to be taxed, and also pay the amount so computed to be due as aforesaid, together with legal interest thereon from the date of said occupation, or so much thereof as the purchase-money of the mortgaged property will pay into the registry of the court for distribution, and which shall thereupon be distributed to the bondholders named in Schedule A (upon production of their bonds and indorsement of amount paid
108 thereon) *pro rata*, with such amount as may be found due upon the one hundred and twenty bonds not named in said schedule, according to the reference hereinafter provided for, and that the holders of the said collateral bonds shall receive payment *pro rata* with the holders of other bonds according to the full face of their bonds, with interest and up to but not beyond the amounts actually due to them and for which they hold said collaterals, and that the master take a receipt for the amount so paid and file the same, and that he bring the surplus moneys arising from said sale, if any there be, into court without delay, to abide the further order of the court.

14th. And it is further ordered, adjudged, and decreed that as soon as possible after the filing of his report of sale, which report shall describe said lands generally as described in the mortgage or as contained in the respective counties, and need not contain detailed descriptions of parcels as found in said lists of selections on file, and after the confirmation of said report and sale, said master shall proceed to ascertain the holders of and the amount due upon said outstanding 120 bonds and any coupons which may be thereto attached, and that he fix a reasonable time and place for the production before him of any such bonds and for proof of the amount due thereon, and give notice thereof to the solicitors for said assignees and said complainant, and, in case such amount shall not be proved satisfactorily before him, that he have authority to adjourn the hearing and publish a notice for at least thirty (30) days, daily, Sundays and holidays excepted, in one daily newspaper printed and published in the city of Detroit and in one daily newspaper printed and
109 published in the city of New York, requiring all holders or owners to produce said bonds before him at a given time and place, to which the hearing shall have been adjourned, and shall send by mail, post paid, a copy of said notice to persons who, upon diligent inquiry to be made by said master, shall appear to hold any of said bonds, and said master may adjourn said hearing — his discretion, and upon completion thereof shall file his report of the same with proofs taken.

15th. And it is further ordered, adjudged, and decreed that upon the coming in and confirmation of said report concerning the holders of and the amount due upon said one hundred and twenty bonds and any coupons thereto attached the register of the court shall make distribution as hereinbefore provided, and shall cancel the bonds, if fully paid, and otherwise shall indorse upon the bonds the amounts paid.

16th. And it is further ordered, adjudged, and decreed that the

defendants, The Lake Superior Ship Canal, Railroad and Iron Company, The Union Trust Company of New York, George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said The Lake Superior Ship Canal, Railroad and Iron Company, and all persons claiming or to claim from or under them be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged ship canal, corporate franchises, and four hundred thousand acres of land and personal property and every part or parcel thereof.

17th. And it is further ordered that the purchasers or purchaser of said ship canal, corporate franchises, and four hundred thousand acres of land at such sales be let into possession thereof, and that any of the parties to this cause who may be in possession of said property or any part thereof, and any person who, since the
110 commencement of this suit, has come into possession under them or either of them, deliver possession thereof to the purchaser or purchasers, on production of the master's deed thereof and a certified copy of the order confirming the report of such sales, after such order has become absolute.

18th. And it is further ordered, adjudged, and decreed that if the moneys arising from the said sales shall be insufficient to pay the amounts so computed due to said holders of the eight hundred and eighty bonds by the court and found to be due to the holders of said 120 bonds by the master or any part thereof after such distribution by the register, with interest, costs, and expenses of sales as aforesaid, the said defendants, The Lake Superior Ship Canal, Railroad and Iron Company, who are in their corporate capacity liable for the debts secured by the said mortgage, do pay to the complainant the amount of such deficiency, with interest thereon, and that the complainant have execution therefor.

19th. The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the pleadings, proceedings, and proofs in this cause, are as follows, viz:

(1.) The ship canal belonging to said Lake Superior Ship Canal, Railroad and Iron Company, extending from Portage Lake to Lake Superior, through the neck of land called the Portage, at Portage Lake, Keweenaw Point, Lake Superior, in said district, and connecting the waters of Lake Superior with the waters of Portage Lake, together with all the rights and franchises growing out of or appertaining to said ship canal and together with all the corporate rights and franchises of said Lake Superior Ship Canal, Railroad and Iron Company.

111 (2.) All the vessels, tugs, dredges, and equipments and together with all other goods or chattels of said company in any way relating to or appertaining to or connected with said ship canal or the using and operating the same.

(3.) All and singular the four hundred thousand acres of land, being the same granted to the said The Lake Superior Ship Canal, Railroad and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Canal Company, by two several acts

of Congress, the first being by an act entitled "An act granting lands to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior," approved March the 3d, 1865, and granted and conferred upon said Portage Lake and Lake Superior Ship Canal Company by act of the Legislature of the State of Michigan of March 18th, 1865, entitled "An act to accept a grant of land by act of Congress to aid in the construction of the ship canal and harbor at the head of Portage Lake to connect with Lake Superior and to provide for the construction of the same," and the second by an act of Congress entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," approved July 3d, 1866, accepted by said State by act of March 27th, 1867, and enuring to said Lake Superior Ship Canal, Railroad and Iron Company by virtue of said act of Congress, and all the rights, benefits, and equities of redemption of said "The Lake Superior Ship Canal, Railroad and Iron Company and of George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said The Lake Superior Ship Canal, Railroad and Iron Company in all the said ship canal, corporate franchises, and
112 said four hundred thousand acres of land under the incumbrances declared to be existing valid liens thereon, having priority to said mortgage in which complainant is trustee, which incumbrances and priority are hereinbefore set forth.

20th. And it is further ordered, adjudged, and decreed that the complainant herein do recover his costs, to be taxed, but not as against said assignees.

21st. And it is further ordered that any of the parties hereto or who may be interested in said bonds or any party who may acquire the title to any of said mortgaged property may apply to the court upon the footing of this decree for any other or further order or relief which may be necessary or proper in the premises.

(Signed) N. H. SWAYNE,
*Ass. Jus. Sup. Court U. S.*

(Signed) JNO. W. LONGYEAR,
*District Judge.*

SCHEDULE A.

Schedule of interest computed on the following list of bonds and coupons attached, issued by the Lake Superior Ship Canal, Railway and Iron Company July 1st, 1870, and proved in this cause and held by the persons herein named as bondholders.

Isaac H. Knox:

| | |
|---|---|
| 268 bonds, dated July 1st, 1870, due July 1st, 1871, of one thousand dollars each | $268,000 00 |
| 147 coupons, $35 each, due July 1st, 1871 | 5,145 00 |
| 121 bonds, with two coupons of $35 each, due Jan'y and July, 1871 | 8,470 00 |

| | |
|---|---|
| Interest on 268 bonds from July 1st to date, at 7 % | $53,153 34 |
| " " 147 coupons " " " " " | 1,020 38 |
| " " 121 do. " " " " " | 839 95 |
| " " 121 do. " Jan. 1st, 1871, " " | 988 17 |
| | $337,616 84 |

113 Isaac H. Knox and James C. Ayer & Co.:

| | |
|---|---|
| 174 bonds, due July 1st, 1871 | $174,000 00 |
| 164 coupons, $35 each, due Jan'y 1st, 1871 | 5,740 00 |
| 164 do. " " July 1st, 1871 | 5,740 00 |
| 10 do. " " July 1st, 1871 | 350 00 |
| Interest on bonds from July 1st, 1871, to date, at 7 % | 34,510 00 |
| " " 164 coupons, due Jan'y 1st, 1871, to date, 7 % | 1,339 29 |
| " " 165 " " July 1st, " " " | 1,138 39 |
| " " 10 " " " " " " | 69 41 |
| | $222,887 09 |

Prosper P. Shaw:

| | |
|---|---|
| 30 bonds, due July 1st, 1871 | $30,000 00 |
| 30 coupons, due Jan'y 1st, 1871, $35 each | 1,050 00 |
| 30 " " July 1st, 1871, " | 1,050 00 |
| Interest on 30 bonds from July 1st, 1871, to date, 7 % | 5,950 00 |
| " " 30 coupons " Jan'y 1st, " " " | 245 00 |
| " " 30 " " July 1st, " " " | 208 25 |
| | $38,503 25 |

Chas. L. Frost:

| | |
|---|---|
| 21 bonds, with two coupons of $35 each, due July 1st, 1871 | $21,000 00 |
| 6 bonds, with one coupon of $35, due July 1st, 1871 | 6,000 00 |
| 21 coupons, $35 each, due July 1st, 1871 | 735 00 |
| 21 " " " Jan'y 1st, 1871 | 735 00 |
| 6 " " " July 1st, 1871 | 190 00 |
| Interest on 27 bonds from July, 1871, to date, at 7 % | 5,365 00 |
| " " 21 coupons, " Jan'y 1st, 1871, to date, at 7 % | 171 50 |
| " " 21 " " July 1st, " " " | 145 78 |
| " " 6 " " " " " " | 41 65 |
| | $34,383 93 |

Henry S. Welles:

| | |
|---|---|
| Loan by check of August 15th, 1870, with 20 bonds as collateral | $5,250 00 |
| Interest on check from Aug. 15th, 1870, to date | 1,363 84 |
| | $6,613 84 |

114 Edwin J. Huestis:

| | |
|---|---|
| 50 bonds, due July 1st, 1871, with two coupons, $35 each | $50,000 00 |
| 50 coupons, $35 each, due Jan'y 1st, 1871 | 1,750 00 |
| 50 " " " " July 1st, 5871 | 1,750 00 |
| Interest on 50 bonds from July 1st, 1871, to date, at 7% | 9,916 67 |
| Interest on 50 coupons from Jan'y 1st, 1871, to date, at 7% | 408 33 |
| Interest on 50 coupons from July 1st, 1871, to date, at 7% | 347 08 |
| | $64,172 08 |

Henry W. Perkins:

| | |
|---|---|
| Loan of April 1st, 1870, secured by pledge of Co. bonds | $30,000 00 |
| Interest on $30,000 from April 1st, 1870, to date, at 7% | 8,575 00 |
| | $38,575 00 |

George C. Richardson:

| | |
|---|---|
| 251 bonds, due July 1st, 1871 | $251,000 00 |
| 167 coupons, $35 each, due July 1st, 1871 | 5,845 00 |
| 84 " " " " " | 2,940 00 |
| 84 " " Jan'y 1st, " | 2,940 00 |
| Interest on 251 bonds from July 1st, 1871, to date, at 7% | 49,781 66 |
| Interest on 197 coupons from July 1st, 1871, to date, at 7% | 1,159 25 |
| Interest on 84 coupons from July 1st, 1871, to date, at 7% | 583 10 |
| Interest on 84 coupons from Jan'y 1st, 1871, to date, at 7% | 686 00 |
| | $314,935 01 |

115 *Recapitulation.*

| Names of owners of bonds. | No. of bonds. | Amount of bonds. | Amount of coupons. | Interest on bonds. | Interest on coupons. | Amount total. |
|---|---|---|---|---|---|---|
| Isaac H. Knox | 268 | $268.000 00 | $13,615 00 | $53,153 34 | $2,848 50 | $337,616 84 |
| J. H. Knox & J. C. Ayer & Co. | 174 | 174,000 00 | 11,830 00 | 34,510 00 | 2,547 09 | 222,887 09 |
| Charles L. Frost | 27 | 27,000 00 | 1,650 00 | 5,365 00 | 358 93 | 34,383 93 |
| Prosper P. Shaw | 30 | 30,000 00 | 2,100 00 | 5,950 00 | 453 25 | 38,503 25 |
| Henry C. Welles | 20 | 5,250 00 | | 1,363 84 | | 6,313 84 |
| Edwin J. Huestis | 50 | 50,000 00 | 3,500 00 | 9,916 00 | 755 41 | 64,171 41 |
| Henry S. Perkins | 60 | 30,000 00 | | 8,575 00 | | 38,575 00 |
| George C. Richardson | 251 | 251,000 00 | 11,725 00 | 49,781 66 | 2,428 35 | 314,935 01 |
| | 880 | $835,250 00 | $44,430 00 | $168,614 84 | $9,391 53 | $1,057,686 37 |

116 Said plaintiff further introduced in evidence a certified transcript of a decree of the circuit court of the United States for the eastern district of Michigan, of which a copy is hereinafter set forth; and it was admitted on the part of the defendants that prior to the rendition of said decree the proper proceedings had been taken in the several causes therein entitled to confer jurisdiction upon said court to make said decree, and that the statements set forth in said decree are correct and true.

Said plaintiff's counsel also introduced in evidence a certified copy of the master's report of sale under said decree, which was attached to the transcript of decree and certified together with said decree. The following is a copy of said decree and of the master's report of sale and the certificate of the clerk of said court attached thereto:

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment in the district court room, in the city of Detroit, on Monday, the twelfth day of February, in the year one thousand eight hundrad and seventy-seven.

Present: The Honorable Henry B. Brown, district judge, and the Honorable Halmer H. Emmons, circuit judge.

JOHN SUTHERLAND, Trustee, Complainant,
*vs.*
THE LAKE SUPERIOR SHIP CANAL, RAILroad and Iron Company; Charles L. Frost, Trustee; Thomas N. McCarter, Trustee; Lucian Birdseye, Trustee; The Union Trust Company of New York, Trustee; Samuel L. Smith, William Harris, and George Jerome and Ferdinand C. Beaman, Assignees in Bankruptcy of the aforesaid Ship Canal and Iron Company, Defendants.

117 LUCIAN BIRDSEYE, Trustee, Complainant,
*vs.*
THE LAKE SUPERIOR SHIP CANAL, RAILroad and Iron Company; Thomas N. McCarter, Trustee; The Union Trust Company of New York, Trustee; George Jerome and Ferdinand C. Beaman, Assignees in Bankruptcy of the Lake Superior Ship Canal, Railroad and Iron Company, Defendants.

| | |
|---|---|
| THE UNION TRUST COMPANY OF NEW YORK, Trustee, Complainant, *vs.* GEORGE JEROME and FERDINAND C. BEAMAN, Assignees in Bankruptcy of the Lake Superior Ship Canal, Railroad and Iron Company, and The Lake Superior Ship Canal, Railroad and Iron Company, Defendants. | In Equity. |
| GEORGE JEROME and FERDINAND C. BEAMAN, Assignees in Bankruptcy of the Lake Superior Ship Canal, Railroad and Iron Company, Complainants, *vs.* JOHN L. SUTHERLAND, Trustee; CHARLES L. FROST, Trustee; Lucian Birdseye, Trustee; Thomas N. McCarter, Trustee; The Union Trust Company of New York, Trustee; Jonathan P. Wells, Samuel L. Smith, and William Harris, Defendants. | In Equity. Supplemental Cross Bill. |

These causes came on to be heard together as one cause pursuant to previous order at the same time, and were argued by counsel, and thereupon and upon consideration thereof it is ordered, adjudged, and decreed as follows, to wit;

First. That the said The Lake Superior Ship Canal, Rail-
118 road and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Canal Company, did duly authorize the issue of and did issue the series of bonds set forth in the bill brought by John L. Sutherland, trustee, namely, one thousand bonds of five hundred dollars each, numbered from 1 to 1000, bearing date the first day of July, 1865, and each payable at the Ocean Bank, in the city of New York, on the first day of July, 1875, bearing interest at the rate of ten per cent. per annum, payable semi-annually on the first days of January and July of each year, according to the interest warrants thereto respectively attached.

Second. Also that the said company did duly authorize the execution of and did duly execute and deliver to Columbus C. Douglass, of the city of New York, as set forth in said last-named bill, the mortgage which is therein fully set forth and described, said mortgage bearing date the first day of July, 1865, and duly executed by the officers of said company under the seal thereof, and the execution duly proven and acknowledged so as to entitle the same to be recorded pursuant to the laws of the State of Michigan, and that the said mortgage was duly recorded in the proper counties where the mortgaged property is situated, and that the said mortgage was intended to secure and does secure the series of bonds described therein and which were issued as aforesaid.

Third. That the said mortgage was also executed by Columbus C.

Douglass, the predecessor in the trust of the said John L. Sutherland, the complainant above named, as trustee, on the day of the date of the said mortgage, and that said Columbus C. Douglass afterwards, on the ninth day of March, 1867, resigned the trusteeship by an instrument under his hand and seal, duly recorded in the counties aforesaid, and that on the 13th day of the same month and
119 year D. Randolph Martin, Esquire, was, on proper petition, appointed his successor trustee by the Honorable George S. Barnard, a justice of the supreme court of the State of New York, by an instrument under his hand and seal, duly recorded as aforesaid; that afterwards, on the 13th day of April, 1872, the said D. Randolph Martin resigned his said trusteeship by an instrument under his hand and seal, duly recorded as aforesaid, and thereafter, on the 18th day of May, 1872, the said John L. Sutherland, complainant, was appointed trustee by the Honorable Daniel P. Ingraham, a judge of the supreme court of the State of New York, by an instrument under his hand and seal, which was duly recorded as aforesaid.

Fourth. That the said Lake Superior Ship Canal, Railroad and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Canal Company, did duly authorize the issue of and did issue the series of bonds which are set forth in the above-named bill brought by Lucian Birdseye, complainant, namely, one thousand bonds of five hundred dollars each, numbering from 1 to 1000, bearing date the first day of July, 1868, and each payable at the Ocean Bank, in the city of New York, and bearing interest at the rate of ten per cent. per annum, payable semi-annually on the first days of January and July in each year according to the interest warrants thereto respectively *thereto* attached.

Fifth. Also that the said company did authorize the execution of and did execute and deliver, as set forth in said last-mentioned bill, the mortgage therein fully set forth and described to D. Randolph Martin, of the city of New York, and Thomas V. Davis, of the city of Syracuse, said mortgage bearing date the first day of July, A. D. 1868, duly executed by the officers of said company under the seal thereof, and the execution duly acknowledged and proven so
120 as to entitle the same to be recorded under the laws of the State of Michigan, and the said mortgage was duly recorded in the proper counties where said mortgaged property is situated, and that said mortgage was intended to secure and does secure the series of bonds described therein and which were issued as aforesaid.

Sixth. That the said mortgage was also executed by said D. Randolph Martin and Thomas V. Davis, predecessors of the said Lucian Birdseye, trustee, complainant, on the day of the date of said mortgage; and that afterwards, on the 13th day of December, 1870, the said Martin and Davis resigned their trusteeship by an instrument under their hands and seals, duly recorded in the counties aforesaid; and thereupon, on the 13th day of December, 1870, the said Lucian Birdseye, complainant, trustee, was appointed trustee by the Honorable Daniel P. Ingraham, a justice of the supreme court of the

State of New York, by an instrument under his hand and seal, which was duly recorded as aforesaid.

Seventh. That all the said one thousand bonds secured by said mortgage to Columbus C. Douglass, and also all the said one thousand bonds secured by said mortgage to Thomas V. Davis and D. Randolph Martin, were issued, negotiated, and used by said Lake Superior Ship Canal, Railroad and Iron Company, and are now held by *bona fide* holders thereof for value.

Eighth. That the said Lake Superior Ship Canal, Railroad and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Canal Company, did duly authorize the issue of and did issue the series of bonds which are set forth in the above-named bill brought by Thomas N. McCarter, trustee, namely, twelve hundred and fifty bonds, numbered from one to 1250, inclusive,
each for one thousand dollars, and each payable at the Ocean
121 National Bank, in New York, on the first day of July, 1871,
bearing date the first day of July, 1870, and bearing interest at the rate of seven per cent. per annum, payable half-yearly on the first day of each month of January and July, A. D. 1871, according to the interest warrants thereto respectively attached; that two hundred and fifty of the said bonds have been since retired, and only one thousand of said bonds, amounting to one million dollars, besides interest, remain outstanding.

Ninth. Also that the said company did duly authorize the execution of and did duly execute and deliver, as set forth in said bill, the mortgage of Charles L. Frost, trustee, which is therein fully set forth and described, said mortgage bearing date the 1st day of July, A. D. 1871, and duly executed by the officers of said company under the seal thereof, and the execution thereof duly proved and acknowledged so as to entitle the same to be recorded under and pursuant to the laws of the State of Michigan, and that said mortgage was duly recorded in the proper counties where the mortgaged property is situated, and that the said mortgage was intended to secure and does secure the series of bonds described therein and which were issued as aforesaid.

Tenth. That the said mortgage was also executed by Charles L. Frost, predecessor of said Thomas N. McCarter, complainant, as trustee, on the day of the date thereof; and that the said Charles L. Frost, on the first day of July, 1872, resigned his trusteeship by an instrument under his hand and seal, duly recorded in the counties aforesaid; that on the second day of the same month Thomas N. McCarter was appointed trustee by the Honorable William H. Leonard, a judge of the supreme court of the State of New York, by an instrument under his hand and seal, which was duly recorded as aforesaid.

Eleventh. That the said mortgage to Charles L. Frost was
122 intended to and did cover and convey the ship canal of
said Portage Lake and Lake Superior Ship Canal Company, together with all the corporate franchises of said company and all of its real and personal property and its four hundred thousand acres of land in the Upper Peninsula of Michigan, received in two

grants from the United States and the State of Michigan, expressly subject, however, to the two aforesaid mortgages made by said company, one made to Columbus C. Douglass, as trustee, conveying the said canal and its franchises and the two hundred thousand acres of land granted by act of Congress of March third, 1865, and the other made to D. Randolph Martin and Thomas T. Davis, trustees as aforesaid, conveying the said canal and its franchises and the other property aforesaid, and also the two hundred thousand acres of land granted by said act of Congress of July third, 1866, and that the said Lake Superior Ship Canal, Railroad and Iron Company made default in the payment of the principal of the said outstanding one thousand bonds secured by said mortgage to Charles L. Frost, trustee, and the interest coupons thereto attached or belonging on the first day of July, A. D. 1871, and that the due demand of the same was made and that the same remained overdue and unpaid, and the same are now outstanding in the hands of *bona fide* holders for value.

Twelfth. That after the execution and delivery of the said mortgages said Portage Lake and Lake Superior Ship Canal Company, on the 29th day of April, A. D. 1871, duly executed amended articles of association under and in pursuance to the provisions of section 2149, as amended, in chapter 73 of the Compiled Laws of the State of Michigan, entitled, "general provisions relating to corporations," so as, among other things, to change the name of said company from the Portage Lake and Lake Superior Ship
123 Canal Company, by which it had before that time been known and designated, to the Lake Superior Ship Canal, Railroad and Iron Company, by which title the said company ever since the said 29th day of April, A. D. 1871, has been known and designated.

Thirteenth. That the said Lake Superior Ship Canal, Railroad and Iron Company did duly authorize the issue of the series of bonds which are set forth in the bill above named, filed by The Union Trust Company of New York, complainant, namely, three thousand five hundred bonds of one thousand dollars each, payable in thirty years from the first day of May, 1871, with interest at seven and three-tenths per cent., payable semi-annually on the first days of May and November, in gold, and principal and interest payable at the office of the Union Trust Company of New York, according to the interest warrants thereto attached, the said bonds bearing date the first day of July, 1871, and that thirteen hundred of such bonds were duly issued by the said company and duly executed by said Union Trust Company of New York, as trustee, and were negotiated and used by said ship canal, railroad and iron company, and are now outstanding in the hands of *bona fide* holders for value, and that twenty-two hundred of the said bonds are still in the custody of the said Union Trust Company of New York, not issued.

Fourteenth. That the said ship canal, railroad and iron company did duly authorize the execution of and did duly execute and deliver to the Union Trust Company of New York, as set forth in said bill, the mortgage therein fully set forth and described, bearing

date the first day of May, 1871, and duly executed by the officers of said company under the seal thereof, and the execution thereof duly proved and acknowledged so as to entitle the same to be recorded under and pursuant to the laws of the State of Michigan, and
124 that said mortgage was duly recorded in the counties where the mortgaged property is located, and that the said mortgage was intended to secure and does secure the series of bonds therein described, to wit, thirteen hundred bonds actually issued as aforesaid, and that the said mortgage was intended to and did cover all the property of said company hereinbefore described, and was made expressly subject to all the prior mortgages hereinbefore described, and that the said Union Trust Company mortgage was also intended to cover two hundred thousand acres of land known as the wagon-road lands, which were acquired from the State of Michigan by one Francis W. Anthony, and which were subscribed to the capital stock of said company under the provisions of the laws of the State of Michigan; and that the said Union Trust Company mortgage did actually cover forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredths acres of the said wagon-road lands, to wit, the lands particularly described in Exhibit C, attached to the bill filed by the said Union Trust Company of New York; and that the said thirteen hundred bonds issued by said Union Trust Company are a first lien on the said forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredth acres (47,958.85) acres of land; that the title of the remainder of said wagon-road lands passed from the State of Michigan to third parties, so that as to the same the said Union Trust mortgage covers only a possible equity, which equity in the said residue of said two hundred thousand acres of wagon-road lands is also a security for said thirteen hundred bonds; and that said Union Trust Company mortgage is a first lien upon the wagon-road lands, and that as to said other property and lands, to wit, said canal franchises and four hundred thousand acres of land, it is a lien junior and sub-
125 sequent to the said McCarter, Birdseye, and Sutherland mortgages so designated—that is to say, the mortgage in which the last-named persons are respectively present trustees as aforesaid—and to the receiver's certificates hereinafter mentioned.

Fifteenth. That this court did duly authorize its receiver, heretofore appointed under said bill brought by John L. Sutherland, trustee, to issue, and that said receiver did issue, two series of receiver's certificates of indebtedness, the first series consisting of five hundred certificates, numbered from 1 to 500, inclusive, each for one thousand dollars, and payable at the National Park Bank in New York on the first day of July, 1873, bearing date the first day of July, 1872, and bearing interest at the rate of ten per cent per annum; the second series consisting of one hundred and thirty-eight certificates, but of which twelve, of one thousand dollars, remain unissued, the entire series being numbered from 1 to 138, inclusive, each for one thousand dollars, and each payable in New York on the first day of May, 1875, bearing date the first day of May, 1874, and bearing interest at the rate of ten per cent., and that the

said certificates are a first lien upon the said ship canal and corporate franchises and upon the said two land grants of two hundred thousand acres, each paramount to the liens of all the mortgages hereinbefore set forth, but are not a lien upon any of the said wagon-road lands hereinbefore mentioned.

Sixteenth. That the said Lake Superior Ship Canal, Railroad and Iron Company made a default in the payment in the principal of all of said several issues of bonds, or of the interest coupons thereto severally attached, or both, and that due demand of the same was made as they respectively came due; and that the said ship canal company remained in default for over sixty days after the
126 dates when said principal or interest moneys respectively matured, and after the said overdue bonds and coupons respectively were presented, and prior to the beginning of all the aforesaid suits; and that the holders of more than fifty of each of said issues of bonds respectively did thereafter respectively request said trustees, complainants, respectively, to file the said respective bills of foreclosure.

Seventeenth. That the Governor of the State of Michigan duly appointed agents according to law, who selected the four hundred thousand acres of land comprised in the aforesaid grants from the public lands in the Upper Peninsula of Michigan, subject to private entry, and not homestead, pre-emption, or mineral land, and that full lists and descriptions of said four hundred thousand acres of land were approved by the Secretary of the Interior and certified to said State according to law, and were deposited and remained of record in the Land Office of the United States, at Washington, and in the proper office of the State of Michigan, at Lansing, and that true copies of said lists and descriptions of the four hundred thousand acres of the canal grant lands so selected are on file in the proofs under the said bill brought by Thomas N. McCarter, trustee, attached to the deposition of George S. Frost, who was one of the said agents; and that all of the mortgages hereinbefore mentioned and issued as aforesaid, and hereinbefore declared to be liens, in the order of preference hereinbefore set forth, upon said four hundred thousand acres of land described in said mortgages solely by reference to said acts of Congress and of the State of Michigan and not by parcels, do cover and convey and are valid liens upon each and every parcel of land set forth and described in the aforesaid lists and descriptions of the selection of said four hundred thou-
127 sand acres; that said lands lie partly in the eastern and partly in the western district, within the State of Michigan, to wit, that part of said lands situated in the counties of Delta and Menominee lying in the western district and the remainder in the eastern district of Michigan.

Eighteenth. That the said wagon-road lands lie in the eastern district of Michigan, and that a description of the parcels of said wagon-road lands is attached as Exhibit C to the bill filed by the Union Trust Company of New York, which exhibit is the certificate number one of military road land under the act No. 20 of the laws of 1864, approved February fourth, 1864, and which certificate, Ex-

hibit C, is a true copy of the list and certificate on file in the office of secretary of state of the State of Michigan; and that the said Union Trust Company mortgage is a joint lien upon each and every parcel of land set forth in said list or certificate, and is also a first lien upon any right or estate of the said mortgagor company in and to the rest and residue of the said two hundred thousand acres of wagon-road lands.

Nineteenth. That all the said receiver's certificates of indebtedness, except twelve as before mentioned, were issued, negotiated, and used and are still outstanding and held by the *bona fide* holders for value, and that the same are of first and paramount lien upon all of the property aforesaid except the wagon-road lands mentioned in the next preceding paragraph of this decree, and that the amount due upon both series of receiver's certificates of indebtedness at the rate of this decree is the sum of nine hundred and thirty-four thousand four hundred and seventy-eight dollars.

Twentieth. That as to seven hundred and forty-seven bonds of the issue secured by the said Sutherland mortgage, and as to
128 eight hundred and forty-one bonds of the issue secured by the said Birdseye mortgage, and as to nine hundred bonds of the issue secured by said McCarter mortgage, and as to seven hundred and eighty-six bonds of the issue secured by the said Union Trust Company mortgage it is in proof in the said cause under the said supplemental and cross-bill that they are now held by *bona fide* holders for value, and that the persons named in Schedule A attached to this decree as holding said bonds are absolute owners in good faith for the value of the bonds stated in said schedule respectively as held by them; and that the several sums due to the several holders of the said bonds of different issues and interest warrants, as well for principal as for the interest that is secured and remains unpaid up to the date of this decree, according to the computation made by the court attached to this decree and made a part hereof, marked Schedule A, amounts to the sum of $3,361,657.18, three million three hundred and sixty-one thousand six hundred and fifty-seven and $\frac{18}{100}$ dollars, and that sundry other bonds of each of said four series remain outstanding and unpaid and the holders thereof and the amounts due thereon remain to be ascertained in the manner hereinafter provided.

Twenty-first. It is further ordered, adjudged, and decreed that the attempt of the defendant, Jonathan T. Wells, to redeem or obtain release of certain lands from the lien of the mortgage of the first of July, 1868, and the alleged release of said lands by Lucian Birdseye, trustee, as set forth in said cross-complaint, having taken place after the institution of the suit for foreclosure of said mortgage, were and are ineffectual and void.

Twenty-second. And it is further ordered, adjudged, and decreed that unless the said Lake Superior Ship Canal, Railroad and
129 Iron Company, or the said George Jerome and Ferdinand C. Beaman, assignees in bankruptcy of the said Lake Superior Ship Canal, Railroad and Iron Company, do pay or cause to be paid into the registry of this court for distribution to the holders named

in Schedule A, *pro rata*, with any amount that may hereafter be found to be due to the holders of the other bonds not yet ascertained, the amount so computed and decreed to be due the holders named in Schedule A as aforesaid, together with the interest thereon from the date of this decree, and also the costs of these suits prior to the sale of said property as hereinafter provided; that all and singular the said mortgaged ship canal, corporate franchises, personal property, two land grants of two hundred thousand acres of land each, forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredths acres of wagon-road lands, and all the right and equity of the said ship canal company in the residue of said two hundred thousand acres of wagon-road lands, being the property mentioned in the various bills of complaint in this cause, be sold at public auction by or under the direction of Addison Mandell, Esq., a master in chancery of this court, or in case of his death, absence, or inability to act by any other master of chancery of this court, and that the sale be made at the front door of the court-house in the county of Houghton, in said district, in which county said canal, personal property, and part of said six hundred thousand acres of land are situated.

Twenty-third. And this court now finds upon the proofs that the sale of said property ought to take place in the manner and parcels next herein specified, and it is accordingly ordered, adjudged, and decreed—

130 First. That the property covered and conveyed by the said Union Trust Company mortgage—that is to say, the forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredths acres of wagon-road lands, being that portion of said lands particularly described in Exhibit C, attached to the Union Trust Company bill—together with all the equity of redemption or other rights or interest of said mortgagor corporations in the residue of said wagon-road lands, and also all the equity of redemption or other right or interest of said mortgagor corporations as covered by the same mortgage in and to the residue of the aforesaid property, viz., the said ship canal and corporate franchises and four hundred thousand acres of canal grant lands, shall be offered, struck off, and sold as one parcel, firstly, at said sale.

That, secondly, at said sale all the property covered by the said Birdseye mortgage—that is to say, the two hundred thousand acres of land granted by the act of Congress of July 3, 1866, together with the equity of redemption and all other right or interest of said mortgagor corporation as covered by the last-mentioned mortgage in and to said ship canal corporate franchises and two hundred thousand acres of land granted by the act of Congress of March 3rd, 1865—shall be offered, struck off, and sold also as one parcel.

That, thirdly, at said sale the property covered by the said Sutherland mortgage—that is to say, the said ship canal and corporate franchises and the two hundred thousand acres of land covered by said act of Congress of March 3rd, 1865, as contained in the aforesaid list and description thereof—shall be offered, struck off, and sold also as one parcel—that is to say, that the sale of the said property covered by

the Union Trust mortgage, except the said wagon-road lands,
131 shall be made subjects to the liens of the said McCarter mortgage, the said Birdseye and Sutherland mortgages, and the said receiver's certificate; and that the sale of the property covered by the Birdseye mortgage shall be made free of incumbrance, except as to the canal, corporate franchises, and land grant of March 3rd, 1865, the sale of which shall be made subject to the lien of said Sutherland mortgage; and that the sale of the property covered by the Sutherland mortgage shall be made free from any incumbrance; and that,

Fourthly, at said sale of the personal property covered by said Sutherland mortgage — shall be sold in view of the same where it lies in said county of Houghton, in said district, and that if it be necessary in order to so sell the same the said master may orally adjourn the said sale of personal property to the place or places where the said personal property may be in said county, and from day to day or otherwise as may be necessary.

Twenty-fourth. (A.) That the proceeds of said sales shall be apportioned and paid out in the manner following, to wit:

1. That the proceeds of the personal and real property covered by the Sutherland mortgage shall form one fund.

2. That the proceeds of the property covered by the Birdseye mortgage shall form another fund.

3. That the proceeds of the property covered by the Union Trust mortgage shall form another fund.

(B.) That the taxable costs under the various bills above entitled shall be apportioned upon and paid ratably out of said fund.

(C.) That the amount due upon the said two series of the said receiver's certificate of indebtedness shall be next paid out of the said Sutherland fund and out of the said Birdseye fund
132 ratably, according to the amount produced by the respective sales.

(D.) That out of any balance remaining in the Sutherland fund the amounts found due upon the said repective Sutherland bonds shall be paid *pro rata*, and if any balance shall remain after such payment it shall be added to the said Birdseye fund.

(E.) That out of the said Birdseye fund there shall first be paid the balance, if any, due upon the first and second series of said receiver's certificates of indebtedness, and out of any surplus remaining after such payments the amounts found due upon the respective Birdseye bonds shall be paid, and if any surplus shall remain after such payments the same shall be applied upon the decree heretofore made by this court in the cause in which Thomas N. McCarter, trustee, was complainant and the said ship canal company and others defendants, and if after the payment of the amount found due under the said last-mentioned decree there shall remain any balance the same shall be applied to the aforesaid fund arising from the sale of the property covered by the said Union Trust mortgage.

(F.) That said last-named fund shall be applied to the payment of the amount found due upon said thirteen hundred Union Trust

bonds respectively, and that any surplus remaining after such payment shall be applied to the said assignees in bankruptcy.

Twenty-fifth. That in payment of the various bills the said certificates of indebtedness and the bonds of the different issues shall be received in the manner following, to wit:

(A.) The said receiver's certificates of indebtedness of both series shall be received in payment of bids for the Sutherland and Birdseye property in the proportion that the said properties are
133 respectively chargeable with the payment of said certificates as hereinbefore declared.

(B.) And for any balance that may remain due upon the bid for the Sutherland property the bonds issued under the Sutherland mortgage shall be received in payment, but not exceeding the amounts found due upon said bonds respectively nor exceeding their *pro rata* valuation as ascertained by the amount of the last-mentioned bid.

(C.) And for any balance that may remain due upon the bid for the Birdseye property the bonds issued under the Birdseye shall be received in payment, but not exceeding the amounts found due upon the said bonds respectively nor exceeding their *pro rata* valuation as ascertained by the amount of the last-mentioned bid.

(D.) And for the bid upon the Union Trust property the bonds issued under the Union Trust mortgage shall be received in payment, but not exceeding the amounts found due upon the said bonds respectively nor exceeding their *pro rata* valuation as ascertained by the amount of the last-mentioned bid.

Twenty-sixth. It is further ordered, adjudged, and decreed that the said master give public notice of the time and place of said sale according to the course and practice of this court, which notice shall set forth the order and manner of said sale according to paragraph twenty-third of this decree, and may describe said lands generally as they are described in said mortgages or by quantity and general description as contained in the respective counties, and need not describe them in detail according to the descriptions of parcels as found in said lists of selections on file.

Twenty-seventh. And it is further ordered, adjudged, and decreed that as soon as possible after the filing of his report of sale, which report shall describe said lands generally as described in the
134 mortgage or as contained in the respective counties, and need not contain detailed descriptions of parcels as found in said list of selections on file, and after the confirmation of said report and sale, said master shall proceed to ascertain the holders thereof and the amount due upon the outstanding bonds held by persons not mentioned in Schedule A and any coupons which may be thereto attached or belonging thereto or otherwise outstanding, unpaid, and held by *bona fide* holders for value, and that he shall fix a reasonable time and place for the production before him of any such bonds and for proof of the amount due thereon and give notice thereof to the solicitors for said assignees and the complainant in said bill of foreclosure, and, in case such amount shall not be proved satisfactorily before him, that he have authority to adjourn

the hearing and publish a notice for at least thirty days daily, Sundays and holidays excepted, in one daily newspaper published and printed in the city of New York, requiring all holders or owners to produce said bonds and coupons before him at a given time and place to which the hearing shall have been adjourned, and shall send by mail, post-paid, a copy of such notice to the persons who, upon diligent inquiry to be made by said master, shall appear to hold any of said bonds, and said master may adjourn said hearing in his discretion, and upon completion thereof shall file his report of the same with the proofs taken by him.

Twenty-eighth. And it is further ordered, adjudged, and decreed that, upon the coming in and confirmation of said report concerning the holders of and the amounts due upon the bonds not included in Schedule A and any coupons thereto attached or belonging thereto, the register of the court shall make distribution of the remaining funds among the holders of the bonds so proved
135 before the master according to their respective rights, as hereinbefore declared, and shall cancel the bonds if fully paid, and otherwise shall indorse upon the bonds the amount paid.

Twenty-ninth. It is further ordered, adjudged, and decreed that the said defendants, The Lake Superior Ship Canal, Railroad and Iron Company and George Jerome and Ferdinand C. Beaman, assignees in bankruptcy of the said Lake Superior Ship Canal, Railroad and Iron Company, and all persons claiming or to claim from and under them be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged ship canal, corporate franchises, four hundred thousand acres of canal-grant lands, two hundred thousand acres of wagon-road lands, and personal property aforesaid and every part and parcel thereof.

Thirtieth. And it is further ordered that the purchasers or purchaser of said ship canal, corporate franchises four hundred thousand acres of canal-grant lands, two hundred thousand acres of wagon-road land at such sale be let into possession thereof, and that any of the parties to said cause who may be in possession of said propety or any part thereof and any person who, since the commencement of said suits, has come into possession under them or either of them deliver possession thereof to the purchaser or purchasers on production of a master's deed thereof and a certified copy of the order confirming the report of such sales after such order has become absolute.

Thirty-first. And it is further ordered, adjudged, and decreed that if the moneys arising from said sale shall be insufficient to pay the amounts so computed due to said holders of bonds included in Schedule A and subsequently found to be due to the holders of bonds not included in Schedule A or any part thereof after
136 such distribution by the master, with interest, costs, and expenses of the sale as aforesaid, the said defendant, The Lake Superior Ship Canal, Railroad and Iron Company, which is in its corporate capacity liable for the debts secured by said respective mortgages, do pay to the complainants therein respectively, in the order of their respective preferences, the amounts of such deficien-

cies, with interest thereon, and that the said respective complainants have execution therefor.

Thirty-second. The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgages above referred to or from the pleadings, proceedings, and proofs in this cause, are as follows:

(1.) The ship canal belonging to said Lake Superior Ship Canal, Railroad and Iron Company, extending from Portage Lake to Lake Superior, through the neck of land called the Portage, at Portage Lake, Keweenaw Point, Lake Superior, in said district, and connecting the waters of Lake Superior with the waters of Portage Lake, with all its appurtenances, and including all lands, tenements, and hereditaments necessary to the full use and enjoyment of said canal and covered by said mortgages or any of them, together with all the rights and franchises growing out of or appertaining to said ship canal, and together with all the corporate rights and franchises of said Lake Superior Ship Canal, Railroad and Iron Company.

(2.) All the vessels, tugs, dredges, and equipments, together with all other goods or chattels of said company in any way relating to or appertaining to or connected with said ship canal or the using or operating of the same.

(3.) All and singular the four hundred thousand acres of land, being the same granted to the said Lake Superior Ship Canal, Railroad and Iron Company under its former name of the Portage
137 Lake and Lake Superior Ship Canal Company by two several acts of Congress, the first being an act entitled "An act granting lands to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior," approved March 3, 1865, and granted and conferred upon said Portage Lake and Lake Superior Ship Canal Company by act of the Legislature of the State of Michigan, passed on or about the 18th of March, 1865, entitled "An act to accept a grant of land by act of Congress to aid in the construction of the ship canal and harbor at the head of Portage Lake to connect with Lake Superior and to provide for the construction of the same," and the second by an act of Congress entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," approved July 3d, 1866, accepted by the said State by act of March 27th, 1867, and inuring to said Lake Superior Ship Canal, Railroad and Iron Company by virtue of said act of Congress, and all and singular forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredths acres of land subscribed to the capital stock of the said Lake Superior Ship Canal, Railroad and Iron Company and theretofore acquired from the State of Michigan by one Francis W. Anthony, and being parcel of two hundred thousand acres of so-called wagon-road lands acquired from the State aforesaid by Francis W. Anthony aforesaid under the provisions of act No. 20 of the laws of the State of Michigan of 1864, approved February 4th, 1864, being an act to provide for the construction of a wagon road from Fort Wilkins, in the State of Michigan, to Fort Howard, in the State

of Wisconsin, together with all the rights and equity of said mortgagor corporation in and to the rest and residue of the said
138 two hundred thousand acres, and all the rights, benefits, and equities of redemption of the said The Lake Superior Ship Canal, Railroad and Iron Company and of George Jerome and Ferdinand C. Beaman, assignees in bankruptcy of the said company, in all the said ship canal, corporate franchises, said four hundred thousand acres of said canal-grant lands, and said two hundred thousand acres of wagon-road lands under the incumbrance declared to be existing valid liens thereon in and by this decree.

Thirty-third. And it is further ordered, adjudged, and decreed that the complainants in the several bills of foreclosure aforesaid do recover their costs respectively, to be taxed, but not as against said assignees.

Thirty-fourth. And it is further ordered that any of the parties in any of the said above-entitled causes or who may be interested in the said various issues of bonds or any parties who may acquire title to any of said mortgaged property may apply to the court upon the footing of this decree for any other or further order or relief which may be necessary or proper in the premises.

Judge Brown did not participate in the above decree or order.

*Report of Sale.*

STATE OF MICHIGAN, } ss:
*County of Houghton,* }

J. R. Devereau, being duly sworn, deposes and says that he is the printer and publisher of the Portage Lake Mining Gazette, a public newspaper printed and circulated in said county of Houghton. Notice of chancery sale, of which the annexed is a true copy, was published in said newspaper once in each week for seven
139 successive weeks, commencing on the fifteenth day of March, A. D. 1877, and ending on the twenty-sixth day of April, A. D. 1877.

J. R. DEVEREAU.

Subscribed and sworn to before me this 11th day of May, A. D. 1877.

[SEAL.] J. W. RAYMOND,
*Notary Public for said County.*

*Chancery Sale.*

In pursuance and by virtue of a decree of the circuit court of the United States for the eastern district of Michigan, in equity, made on the 12th day of February, A. D. 1877, in three certain causes therein pending, wherein John L. Sutherland, trustee; Lucian Birdseye, trustee, and The Union Trust Company of New York, trustee, are complainants and The Lake Superior Ship Canal, Railroad and Iron Company and certain incumbrancers and assignees in bankruptcy of said company are defendants, and in another

cause therein pending, wherein George Jerome and Ferdinand C. Beaman, assignees in bankruptcy of said company, are complainants and the aforesaid trustees and others are defendants in the supplemental and cross bill to all of the above-entitled causes, for the adjudged indebtedness of four millions two hundred and ninety-six thousand one hundred and thirty-five and eighteen-hundredths ($4,296,135.18) and such further sum as may be due on the claims of the holders of one thousand and twenty-six (1,026) bonds not yet proved, notice is hereby given that I shall sell at public auction, to the highest bidder, on Friday, the 27th day of April, one thousand eight hundred and seventy-seven, April 27th, A. D. 1877, at twelve (12) o'clock noon of that day, at the front door of the court-house, in the county of Houghton, in the State and eastern district of Michigan, the following-described property, to wit:

140 (1.) The ship canal belonging to said Lake Superior Ship Canal, Railroad and Iron Company, extending from Portage Lake to Lake Superior, through the neck of land called the Portage, at Portage Lake, Keweenaw Point, Lake Superior, in said district, and connecting the waters of Lake Superior with the waters of Portage Lake, with all its appurtenances, and including all lands, tenements, and hereditaments necessary to the full use and enjoyment of said canal and covered by said mortgages or any of them, together with all the rights and franchises growing out of or appertaining to said ship canal, and together with all the corporate rights and franchises of said Lake Superior Ship Canal, Railroad and Iron Company.

(2.) All the vessels, tugs, dredges, and equipments, together with all other goods or chattels of said company in any way relating to or appertaining to or connected with said ship canal or the using or operating of the same.

(3.) All and singular the four hundred thousand acres of land, being the same granted to the said Lake Superior Ship Canal, Railroad and Iron Company under its former name of the Portage Lake and Lake Superior Ship Canal Company by two several acts of Congress, the first being an act entitled "An act granting lands to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior," approved March 3, 1865, and granted and conferred on said Portage Lake and Lake Superior Ship Canal Company by act of the Legislature of the State of Michigan, passed on or about the 18th of March, 1865, entitled "An act to accept a grant of lands by act of Congress to aid in the construction of the ship canal and harbor at the head of Portage Lake to connect with Lake Superior and to provide for the construction of the same," and the second by an act of Congress entitled

"An act granting lands to the State of Michigan to aid in the
141 construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," approved July 3d, 1866, accepted by the said State by act of March 27th, 1867, and inuring to said Lake Superior Ship Canal, Railroad and Iron Company by virtue of said act of Congress, and all and singular forty-seven thousand nine hundred and fifty-eight and eighty-five

one-hundredths acres of land subscribed to the capital stock of the said Lake Superior Ship Canal, Railroad and Iron Company and theretofore acquired from the State of Michigan by one Francis W. Anthony, and being parcel of two hundred thousand acres of so-called wagon-road lands acquired from the State aforesaid by Francis W. Anthony aforesaid under the provisions of act No. 20 of the laws of the State of Michigan of 1864, approved February 4th, 1864, being an act to provide for the construction of a wagon road from Fort Wilkins, in the State of Michigan, to Fort Howard, in the State of Wisconsin, together with all the right and equity of said mortgagor corporation in and to the rest and residue of the said two hundred thousand acres, and all the rights, benefits, and equities of redemption of the said The Lake Superior Ship Canal, Railroad and Iron Company and of George Jerome and Ferdinand C. Beaman, assignees in bankruptcy of said company, in all the said ship canal, corporate franchises, said four hundred thousand acres of canal-grant lands, and said two hundred thousand acres of wagon-road lands under the incumbrance declared to be existing valid liens thereon in and by this decree.

Notice is also given that under and by virtue of the direction in said decree contained the said sale will be made in the order and manner following, to wit:

(1.) The property covered and conveyed by the said Union Trust Company mortgage—that is to say, the forty-seven thousand
142 nine hundred and fifty-eight and eighty-five one-hundredths (47,958.85) acres of wagon-road lands, being that portion of said lands particularly described in Exhibit C attached to the Union Trust Company bill, which exhibit is a true copy of the list and certificate of purchase number one of military-road lands under an act, No. 20, of the laws of Michigan of 1864 now on file in the office of secretary of state for the State of Michigan, on which list of lands said Union Trust Company mortgage is a first lien, that list of said lands being part of two hundred thousand acres of land granted by the State of Michigan for the construction of a military and wagon road and acquired from the said State by one Francis W. Anthony and conveyed to said mortgagor corporation by deed of Perez J. Avery, Alfred Wild, and J. Edwin Conant and their wives, dated on the first day of May, A. D. 1871, and recorded in the office of the register of deeds for Houghton, Marquette, Ontonagon, and Keweenaw counties, in said State, describing said lands, together with all equity of redemption or other right or interest of said mortgagor corporation in the residue of said wagon-road lands, and also all the equity of redemption or other right or interest as covered by the said mortgage in and to the residue of the property of said mortgagor corporation, namely, the said ship canal and corporate franchises and four hundred thousand acres of canal-grant lands, all of which said property covered and conveyed by the said Union Trust Company mortgage will be offered, struck off, and sold as one parcel firstly at said sale.

(2.) All the property covered by the said Birdseye mortgage—that is to say, all and singular the two hundred thousand acres of land,

being the same granted to the said The Lake Superior Ship Canal, Railroad and Iron Company under its former name of the
143 Portage Lake and Lake Superior Ship Canal Company by an act of Congress entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, at Keweenaw, in said State," approved June 3rd, 1866—that is to say, the lands described particularly by lists and descriptions approved by the Secretary of the Interior and certified to said State according to law, which are deposited and remain of record in the land offices at Washington, Lansing, and Marquette, and which are also on file in said court, attached to the depositions of George S. Frost, one of the State agents to select said lands, in the proofs under the bill brought by Thomas N. McCarter, trustee, against said company, together with the equity of redemption and all other rights or interest of said mortgagor corporation as covered by the said Birdseye mortgage in and to said ship canal, corporate franchises, and another two hundred thousand acres of land granted by the act of Congress by the act of March 3rd, 1865, hereinafter next mentioned—will be offered, struck off, and sold as one parcel.

(3.) The property covered by said Sutherland mortgage—that is to say, the said ship canal and corporate franchises and the two hundred thousand acres of land granted to said company under its said former name by an act of Congress entitled "An act granting lands to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior," and subsequently conferred upon said company by the State of Michigan, as contained in the aforesaid lists and descriptions in the said land offices and this court—will be offered, struck off, and sold as one parcel—that is to say, that the sale of the said property firstly
144 above mentioned, covered by the Union Trust mortgage excepting the said wagon lands, which are to be sold free of incumbrance, shall be made subject to the liens of the McCarter mortgage, the Birdseye and Sutherland mortgages, and the receiver's certificates, and that the sale of the property secondly above mentioned shall be made free of incumbrance except as to the canal, corporate franchises, and land grant of March 3rd, 1865, the sale of which shall be subject to the lien of said Sutherland mortgage, and that the sale of the property thirdly above mentioned, covered by said Sutherland mortgage shall be made free from any incumbrance.

(4.) At said sale the personal property covered by said Sutherland mortgage shall be sold in view of the same where it lies, in said county of Houghton, in said district.

Dated Detroit, March 8th, 1877.

ADDISON MANDELL,
*Master in Chancery of the Circuit Court of the United States for the Eastern District of Michigan.*

ALFRED RUSSELL,
*Solicitor for Complainant*, 91 *Griswold Street, Detroit.*

STATE OF MICHIGAN, } ss:
*County of Houghton,* }

J. R. Devereau, being duly sworn, deposes and says that he is the printer and publisher of the Portage Lake Mining Gazette, a public newspaper printed and circulated in said county of Hougton. Notice of postponement, of which the annexed is a true copy, was published in said newspaper once in each week for two successive weeks, commencing on the third day of May, A. D. 1877, and ending on the tenth day of May, A. D. 1877.

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J. R. DEVEREAU.

Subscribed and sworn to before me this 11th day of May, A. D. 1877.

[SEAL.] J. W. RAYMOND,
*Notary Public for said County.*

*Chancery Sale.*

In pursuance and by virtue of a decree of the circuit court of the United States for the eastern district of Michigan, in equity, made on the 12th day of February, A. D. 1877, in three certain causes therein pending, wherein John L. Sutherland, trustee; Lucian Birdseye, trustee, and The Union Trust Company of New York, trustee, are complainants and The Lake Superior Ship Canal, Railroad and Iron Company and certain incumbrancers and assignees in bankruptcy of said company are defendants, and in another cause therein pending, wherein George Jerome and Ferdinand C. Beaman, assignees in bankruptcy of said company, are complainants and the aforesaid trustees and others are defendants in the supplemental and cross bill to all of the above-entitled causes, for the adjudged indebtedness of four millions two hundred and ninety-six thousand one hundred and thirty-five and eighteen hundredths dollars ($4,296,135.18), and such further sums as may be due on the claims of the holders of one thousand and twenty-six (1,026) bonds not yet proved, notice is hereby given that I shall sell at public auction to the highest bidder, on Friday, the 27th day of April, one thousand eight hundred and seventy-seven, April 27th, A. D. 1877, at twelve (12) o'clock noon of that day, at the front door of the court-house, in the county of Houghton, in the State and eastern district of Michigan, the following-described property, to wit:

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(1.) The ship canal belonging to the said Lake Superior Ship Canal, Railroad and Iron Company, extending from Portage Lake to Lake Superior, through the neck of land called the Portage, at Portage Lake, Keweenaw Point, Lake Superior, in said district, and connecting the waters of Lake Superior with the waters of Portage Lake, with all its appurtenances, and including all lands, tenements, and hereditaments necessary to the full use and enjoyment of said canal and covered by said mortgages or any of them, together with all the rights and franchises growing out of or appertaining to said ship canal, and together with all the corporate rights

and franchises of said Lake Superior Ship Canal, Railroad and Iron Company.

(2.) All the vessels, tugs, dredges, and equipments, together with all other goods or chattels of said company in any way relating to or appertaining to or connected with said ship canal or the using or operating of the same.

(3.) All and singular the four hundred thousand acres of land, being the same granted to the said Lake Superior Ship Canal, Railroad and Iron Company under its former name of the Portage Lake and Lake Superior Ship Canal Company by two several acts of Congress, the first being an act entitled "An act granting lands to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior," approved March 3, 1865, and granted and conferred upon said Portage Lake and Lake Superior Ship Canal Company by act of the Legislature of the State of Michigan, passed on or about the 18th of March, 1865, entitled "An act to accept a grant of land by act of Congress to aid in the construction of the ship canal and harbor at the head of Portage Lake to connect with Lake Superior and to provide for the construction of the same," and the second by an
147 act of Congress entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," approved July 3rd, 1866, accepted by the said State by act of March 27th, 1867, and inuring to said Lake Superior Ship Canal, Railroad and Iron Company by virtue of said act of Congress, and all and singular forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredths acres of land subscribed to the capital stock of the said Lake Superior Ship Canal, Railroad and Iron Company and theretofore acquired from the State of Michigan by one Francis W. Anthony, and being parcel of two hundred thousand acres of so-called wagon-road lands acquired from the State aforesaid by Francis W. Anthony aforesaid under the provisions of act No. 20 of the laws of the State of Michigan of 1864, approved February 4th, 1864, being an act to provide for the construction of a wagon road from Fort Wilkins, in the State of Michigan, to Fort Howard, in the State of Wisconsin, together with all the right and equity of said mortgagor corporation in and to the rest and residue of the said two hundred thousand acres, and all the rights, benefits, and equities of redemption of the said The Lake Superior Ship Canal, Railroad and Iron Company and of George Jerome and Ferdinand C. Beaman, assignees in bankruptcy of the said company, in all the said ship canal, corporate franchises, said four hundred thousand acres of canal-grant lands, and said two hundred thousand acres of wagon-road lands under the incumbrance declared to be existing valid liens thereon in and by this decree.

Notice is also given that under and by virtue of the direction in said decree contained the said sale will be made in the order and manner following, to wit:

148 (1.) The property covered and conveyed by the said Union Trust Company mortgage—that is to say, the forty-seven

thousand nine hundred and fifty-eight and eighty-five one-hundredths (47,958 & $\frac{85}{100}$) acres of wagon-road lands, being that portion of said lands particularly described in Exhibit C attached to the Union Trust Company bill, which exhibit is a true copy of the list and certificate of purchase number one of military-road lands under an act, No. 20, of the laws of Michigan of 1864, now on file in the office of the secretary of state of the State of Michigan, on which list of lands said Union Trust Company mortgage is a first lien, that list of said lands being part of two hundred thousand acres of land granted by the State of Michigan for the construction of a military and wagon road, and acquired from the said State by one Francis W. Anthony, and conveyed to said mortgagor corporation by deed of Perez J. Avery, Alfred Wild, and J. Edwin Conant and their wives, dated on the first day of May, A. D. 1871, and recorded in the office of the register of deeds for Houghton, Marquette, Ontonagon, and Keweenaw counties, in said State, describing said lands, together with all equity of redemption or other right or interest of said mortgagor corporation in the residue of said wagon-road lands, and also all the equity of redemption or other right or interest as covered by the same mortgage in and to the residue of the property of said mortgagor corporation, namely, the said ship canal and corporate franchises and four hundred thousand acres of canal-grant lands, all of which said property covered and conveyed by the said Union Trust Company mortgage will be offered, struck off, and sold as one parcel firstly at said sale.

(2.) All the property covered by the said Birdseye mortgage—that is to say, all and singular the two hundred thousand acres of land, being the same granted to the said The Lake Superior Ship
149 Canal, Railroad and Iron Company under its former name of the Portage Lake and Lake Superior Ship Canal Company by an act of Congress entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, at Keweenaw, in said State," approved July 3rd, 1866—that is to say, the lands described particularly by lists and descriptions approved by the Secretary of the Interior and certified to said State according to law, which are deposited and remain of record in the land offices at Washington, Lansing, and Marquette, and which are also on file in said court, attached to the deposition of George S. Frost, one of the State agents to select said lands, in the proofs under the bill brought by Thomas N. McCarter, trustee, against said company, together with the equity of redemption, together with all other rights or interest of said mortgagor corporation as covered by the said Birdseye mortgage in and to the said ship canal, corporate franchises, and another two hundred thousand acres of land granted by the act of Congress by the act of March 3rd, 1865, hereinafter next mentioned—will be offered, struck off, and sold as one parcel.

(3.) The property covered by said Sutherland mortgage—that is to say, the said ship canal and corporate franchises and the two hundred thousand acres of land granted to said company under its said former name by an act of Congress entitled "An act granting

lands to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior," and subsequently conferred upon said company by the State of Michigan, as contained in the aforesaid lists and descriptions in said land offices and this court—will be offered, struck off, and sold as one parcel.

150 That is to say, that the sale of the property firstly above mentioned, covered by the Union Trust mortgage excepting the said wagon-road lands, which are to be sold free of incumbrance, shall be made subject to the lien of the McCarter mortgage, the Birdseye and Sutherland mortgages, and the receiver's certificates, and that the sale of the property secondly above mentioned shall be made free of incumbrance except as to the canal, corporate franchises, and land grants of March 3rd, 1865, the sale of which shall be subject to the lien of said Sutherland mortgage, and that the sale of the property thirdly above mentioned, covered by the said Sutherland mortgage, shall be made free from any incumbrance.

(4.) At said sale the personal property covered by said Sutherland mortgage shall be sold in view of the same where it lies, in said county of Houghton, in said district.

Dated Detroit, March 8th, 1877.

ADDISON MANDELL,
*Master in Chancery of the Circuit Court of the United States for the Eastern District of Michigan.*

ALFRED RUSSELL,
*Solicitor for Complainant, 91 Griswold Street, Detroit.*

The above sale is hereby postponed to Friday, the eleventh day of May, A. D. 1877, at the same hour and place.

Houghton, April 27th, 1877.

ADDISON MANDELL,
*Master in Chancery of the Circuit Court of the United States for the Eastern District of Michigan.*

ALFRED RUSSELL,
*Solicitor for Complainant, 91 Griswold Street, Detroit.*

151 Circuit Court of the United States for the Eastern District of Michigan.

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| JOHN L. SUTHERLAND, Trustee, Complainant, *vs.* THE LAKE SUPERIOR SHIP CANAL, RAILROAD and Iron Company, Charles L. Frost, Trustee; Thomas N. McCarter, Trustee; Lucian Birdseye, Trustee; The Union Trust Company of New York, Trustee; Samuel L. Smith, William Harris, and George Jerome and Ferdinand C. Beaman, Assignees in Bankruptcy of the Aforesaid Ship Canal, Railroad and Iron Company, Defendants. | No. 1568. |
| LUCIAN BIRDEYE, Trustee, Complainant, *vs.* THE LAKE SUPERIOR SHIP CANAL, RAILROAD and Iron Company, Thomas N. McCarter, Trustee; The Union Trust Company of New York, Trustee, and George Jerome and Ferdinand C. Beaman, Assignees in Bankruptcy of The Lake Superior Ship Canal, Railroad and Iron Company, Defendants. | No. 1574. |
| THE UNION TRUST COMPANY OF NEW YORK, Trustee, Complainant, *vs.* GEORGE JEROME and FERDINAND C. BEAMAN, Assignees in Bankruptcy of The Lake Superior Ship Canal, Railroad and Iron Company, and The Lake Superior Ship Canal, Railroad and Iron Company, Defendants. | No. 1964. |
| GEORGE JEROME and FERDINAND C. BEAMAN, Assignees in Bankruptcy of The Lake Superior Ship Canal, Railroad and Iron Company, Complainants, *vs.* JOHN L. SUTHERLAND, Trustee; CHARLES L. Frost, Trustee; Lucian Birdseye, Trustee; Thomas N. McCarter, Trustee; Frederick D. Tappan, Trustee; The Union Trust Company of New York, Jonathan T. Wells, Samuel D. Smith, and William Harris, Defendants. | No. 1766. Supplemental and Cross Bills. |

A decree being entered into the above-entitled suits on the twelfth day of February, A. D. one thousand eight hundred and seventy-seven, whereby, among other things, it was directed that unless the said Lake Superior Ship Canal, Railroad and Iron Company
152 or the said George Jerome and Ferdinand C. Beaman, assignees in bankruptcy of the said company, should pay or cause to be paid into the registry of this court for distribution to the

holders of certain securities therein referred to the amount computed to be due to them as set forth in said degree, together with interest thereon from the date of said degree and costs prior to the sale of said property as therein provided, that all and singular the mortgaged ship canal, corporate franchises, personal property, two land grants of two hundred thousand acres each, forty-seven thousand nine hundred and fifty-eight and $\frac{85}{100}$ acres of wagon-road lands, so called, and all the right and equity of the said ship canal company in the residue of the two hundred thousand acres of the wagon-road lands, so called, being the property mentioned in the various bills of complaint in this cause, be sold at public auction by or under the direction of the undersigned, Addison Mandell, a master in chancery of said court, and that the sale be made at the front door of the court-house, in the county of Houghton, in said district, and that the sale of said property should take place in the manner and parcels in said decree specified, being the same manner, order, and parcels in which said property was struck off and sold, as hereinafter set forth:

I, the said Addison Mandell, master as aforesaid, do hereby certify and report that I gave public notice of said sale according to the course and practice of this court by publishing the same once a week for six weeks consecutively next before the time first appointed for such sale in the Portage Lake Mining Gazette, a newspaper for general circulation, printed and published in the county of Houghton, in said district, such notice being as directed by said decree, setting forth the time and place of such sale, and the order,
153 manner, and parcels in which the said sale was to be made, due proof of which notice and of the publication thereof will appear by a printed copy of said notice with the affidavit of the printer of said newspaper attached, and that at the time first appointed for said sale, to wit, on the twenty-seventh day of April, A. D. 1877, attended at the time and place appointed for said sale and adjourned the same by public announcement to the eleventh day of May, A. D. one thousand eight hundred and seventy-seven, at twelve o'clock noon, at the same place, and also gave public notice of said adjournment by causing notice thereof, together with a notice of said sale as originally published, to be published in said newspaper once a week for two successive weeks immediately after said adjournment and preceding the sale of said property, as hereinafter specified, due proof of which further publication will appear by a further affidavit of the printer and publisher of the said newspaper, also hereto annexed.

And I do further report that at the time and place specified in the last-mentioned notice, to wit, on the eleventh day of May, A. D. 1877, at twelve o'clock noon, at the front door of the court-house, in the said county of Houghton, I attended and exposed the said property for sale at public auction in the order, manner, and parcels directed by said decree, and thereupon the said property was struck off and sold to me as follows—that is to say:

First. The property covered and conveyed by the said Union Trust Company mortgage—that is to say, the forty-seven thousand

nine hundred and fifty-eight and eighty-five one-hundredths acres of wagon-road lands, being that portion of said lands particularly described in Exhibit C attached to the Union Trust Company bill, together with all the equity of redemption or other right or
154 interest of said mortgagor corporation in the residue of the wagon-road lands described or referred to in said decree, and also all the equity of redemption or other right or interest of said mortgagor corporation as covered by the same mortgage in and to the residue of the aforesaid property, viz., the said ship canal and corporate franchises and four hundred thousand acres of canal grant lands, were struck off and sold by me as such master to Albon P. Mann and Nathaniel Wilson at the price of twenty thousand ($20,000) dollars, that being the highest sum bid and they being the highest bidders therefor.

Second. All the property covered by the said Birdseye mortgage—that is to say, the two hundred thousand acres of land granted by the act of Congress of July 3rd, 1866, mentioned in said decree, together with the equity of redemption and all other right or interest of said mortgagor corporation covered by the last-mentioned mortgage in and to the said ship canal, corporate franchises, and the two hundred thousand acres of land granted by the act of Congress of March 3rd, 1865, referred to in said decree—were struck off and sold by me as such master to the same parties at the price of five hundred and fifty thousand dollars ($550,000), that being the highest sum bid and they being the highest bidders therefor.

Third. The property covered by the said Sutherland mortgage—that is to say, the said ship canal and corporate franchises and two hundred thousand acres of land granted by said act of Congress of March 3rd, 1865, as contained in the lists and descriptions thereof referred to in said decree—were struck off and sold to the same parties by me as such master at the price of two hundred and fifty thousand dollars ($250,000), that being the highest sum bid and they being the highest bidders therefor.

155 Fourth. All and singular the corporate rights and franchises of the said Lake Superior Ship Canal, Railroad and Iron Company, formerly known as the Portage Lake and Lake Superior Ship Canal Company, together with the said ship canal, being the property essential to the existence of said corporate rights, were sold by me as such master, and as an entire thing, separate from any other property mortgaged, viz., at the price of fifty thousand dollars ($50,000) to the same parties, that being the highest sum bid and they being the highest bidders therefor.

I further report that the said sales were also made in conformity with the other directions of the said decree—that is to say, the sale of said first parcel except the said wagon-road lands, was made subject to the liens of the McCarter mortgage, the said Birdseye and Sutherland mortgages and receiver's certificates mentioned in said decree, and the sale of the said second parcel was made free of incumbrance, except as to the canal, corporate franchises, and land grant of March 3rd, 1865, the sale of which was made subject to the lien of the said Sutherland mortgage, and the sales of the prop-

erty and franchises covered by the said Sutherland mortgage, to wit, the third and fourth parcels above named, were made free from any incumbrance; and, lastly, the personal property covered by said mortgages was struck off and sold by me as such master, in view of the same, to the persons and at the prices following—that is to say, to the said Albon P. Man and Nathaniel Wilson, one rotary dredge, for the sum of $500; one tug, Houghton, for the sum of one thousand dollars ($1,000); four dump scows, for the sum of $240; two wood scows, for the sum of $100; one lot of old iron, etc., for the sum of $260; one dipper dredge, for the sum of $2,500; one steam-tug, Mentor, for the sum of $2,000; one steam pile-driver,
156 for the sum of $400, and four dump scows, for the sum of $400; and to James P. Edwards, one pile-driver, for the sum of $260, and one pile-driver scow, for the sum of $50, the bids so made being the highest bids made for said articles respectively and the said persons so purchasing being the highest bidders therefor.

And I do further certify and report that I have received from the said purchasers, Albon P. Man and Nathaniel Wilson, full payment in cash, to wit, twenty thousand dollars for the bid made by them for the said wagon-road lands, being the parcel first-above described, and that I have also, in pursuance of the authority contained in said decree, received from the same purchasers full payment for all the other property bid off and sold to them as aforesaid, viz., in the receiver's certificates of indebtedness described in the said decree, all of which certificates have been delivered to me, to the end that payment of the same may be endorsed upon them *pro rata* to the aggregate amount of all the other bids above mentioned and made by the same parties.

And I further certify that I have received from James P. Edwards full payment, to wit, three hundred and ten dollars for the articles of personal property bid off or sold to him as above specified.

All of which is respectfully submitted.

May 11, 1877.

ADDISON MANDELL,
*Master in Chancery, Circuit Court U. S.,*
*Eastern District of Michigan.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room, in the city of Detroit, on
157 Monday, the fourteenth day of May, in the year one thousand eight hundred and seventy-seven.

Present: The Honorable Henry B. Brown, district judge.

JOHN H. SUTHERLAND, Trustee, Complainant,
*vs.*
THE LAKE SUPERIOR SHIP CANAL, RAILROAD AND Iron Company, Charles S. Frost, Trustee; Thomas N. McCarter, Trustee; Lucian Birdseye, Trustee; The Union Trust Company of New York, Trustee; Samuel L. Smith, William Harris, and George Jerome and Ferdinand C. Beaman, Assignees in Bankruptcy of the Aforesaid Ship Canal and Iron Co., Defendants. } 1568.

LUCIAN BIRDSEYE, Trustee, Complainant,
*vs.*
THE LAKE SUPERIOR SHIP CANAL, RAILROAD AND Iron Company, Thomas N. McCarter, Trustee; The Union Trust Company of New York, Trustee, and George Jerome and Ferdinand C. Beaman, Assignees in Bankruptcy of the Lake Superior Ship Canal, Railroad and Iron Company, Defendants. } 1574.

THE UNION TRUST COMPANY OF NEW YORK, Trustee, Complainant,
*vs.*
GEORGE JEROME and FERDINAND C. BEAMAN, Assignees in Bankruptcy of The Lake Superior Ship Canal, Railroad and Iron Company, and The Lake Superior Ship Canal, Railroad and Iron Company, Defendants. } 1946. In Equity.

GEORGE JEROME and FERDINAND C. BEAMAN, Assignees in Bankruptcy of the Lake Superior Ship Canal, Railroad and Iron Company, Complainants,
*vs.*
JOHN L. SUTHERLAND, Trustee; CHARLES L. FROST, Trustee; Lucian Birdseye, Trustee; Thomas N. McCarter, Trustee; Frederick D. Tappan, Trustee; The Union Trust Company of New York, Jonathan T. Wells, Samuel L. Smith, and William Harris, Defendants. } 1766. In Equity.

On reading and filing the report of Addison Mandell, Esq., master in chancery of this court, bearing date the eleventh day of May, A. D. 1877 setting forth the sale of the property described in the decree in this cause, with the names of the purchasers and the prices bid for the respective parcels so sold, and, on motion of Alfred Russell, Esq., solicitor and of counsel for the complainants in the three (3) above-entitled original suits, and all the solicitors and counsel for all the several other parties to the above-entitled cause and to this cause appearing in open court and consenting thereto, to wit, Messrs. Meddaugh and Driggs and Ashley Pond, Esquire, for George Jerome and Ferdinand C. Beaman, assignees in bankruptcy of said Ship Canal, Railroad and Iron Com-

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pany, complainants in the above-entitled cross-suits and defendants in the above-entitled three (3) original suits; Don M. Dickinson, Esq., and Messrs. Dickinson & Dickinson, for the defendants, The Lake Superior Ship Canal, Railroad and Iron Company, and for Lucian Birdseye, trustee, and William Jennison, Esq., for the Union Trust Company of New York, trustee, and for Thomas N. McCarter, trustee, defendants, it is ordered, adjudged, and decreed that the report of said master and the sale made by him, as therein set forth, be, and the same hereby are, in all things ratified and confirmed, and that he, the said master, accordingly execute deeds of conveyance of the said mortgaged property to the respective purchasers thereof on compliance by them *of* the terms and conditions of said sales, except as to the personal property, and that as to the personal property that he, the said master, deliver the same to the respective purchasers thereof on like compliance by them with the terms of said sale and execute bills of sale thereof if required.

159 UNITED STATES OF AMERICA, } *ss:*
*Eastern District of Michigan,* }

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify that the above and foregoing are true copies of the final decree, the master's report of sale, and order confirming the same, as the same appear of record and on file in my office; that I have compared the same with the order, entry, and papers, and that they are true and correct transcripts therefrom and of the whole thereof.

Witness my official signature and the seal of said court, at Detroit, in said district, this tenth day of April, in the year one [SEAL.] thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and fourteenth.

WALTER S. HARSHA, *Clerk.*

Plaintiff's counsel further offered in evidence three deeds of conveyance, of which the following are copies, to wit:

This indenture, made the fourteenth day of May, eighteen hundred and seventy-seven, between Addison Mandell, a master in chancery, duly appointed by the circuit court of the United States for the eastern district of Michigan, residing at Detroit, in said district, party of the first part, and Albon P. Man, of the city of New York, and Nathaniel Wilson, of the city of Washington, parties of the second part, witnesseth, as follows:

Whereas, at a session of the circuit court of the United States of the eastern district of Michigan, sitting in chancery, at said city of Detroit, on the twelfth day of February, A. D. 1887, it was,
160 among other things, ordered, adjudged, and decreed by said court in a certain cause pending therein, wherein John L. Sutherland, trustee; Lucian Birdseye, trustee, and The Union Trust Company of New York, trustee, were separate complainants against The Lake Superior Ship Canal, Railroad and Iron Company and others, defendants, and wherein also George Jerome and Fernando C.

Beaman, assignees in bankruptcy of said company, were complainants in a cross-complaint involving the property of the said company that unless the said Lake Superior Ship Canal, Railroad and Iron Company or the said George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said company, should pay or cause to be paid into the registry of said court, for distribution to the holders of certain securities therein referred to, the amount computed to be due to them, as set forth in said decree, together with interest thereon from the date of said decree, and costs prior to the sale of said property as thereinafter provided, that all and singular the mortgaged ship canal, corporate franchise, personal property, two land grants of two hundred thousand acres each, and forty-seven thousand nine hundred and fifty-eight and eighty-five hundredths acres of wagon-road lands, so called, with all the right and equity of the said ship canal company in the residue of the two hundred thousand acres of wagon-road lands, so called, being the property mentioned in the various bills of complaint in said cause, should be sold at public auction by or under the direction of the party of the first part, as a master in chancery of said court, and that the sale thereof should be made at the front door of the court-house, in the county of Houghton, in said district, and that the sale of said property should take place in the manner and parcels in said decree specified;

And whereas, upon failure of the said ship canal company
161 and assignees in bankruptcy to make payment as above required, the said Addison Mandell, party of the first part, having first given six weeks previous notice of the time and place of such sale, as required by the decree aforesaid, with a sufficient description of said mortgaged premises and of the order and manner, time and place, at which the same would be sold, did, upon the eleventh day of May instant, at twelve o'clock noon, at the said court-house, in the county of Houghton, proceed to sell at auction, and did thereupon strike off and sell to the said parties of the second part to these presents all and singular the said mortgaged premises in the order, parcels, and manner prescribed by the said decree for the aggregate sum of eight hundred and seventy thousand dollars ($870,000), the said parties of the second part being the highest bidders therefor, and the sums bidden by them for the said respective parcels being the highest sum bid for the same respectively.

And whereas the sale so made has been confirmed by an order of the said court, duly entered on the fourteenth day of May instant: Now, therefore, this indenture witnesseth that the said party of the first part, a master in chancery as aforesaid, in order to carry into effect the sale so made as aforesaid in pursuance of the said decree and order of court, and in consideration of the premises and of the sum of eight hundred and seventy thousand dollars ($870,000), to him paid by the parties hereto of the second part, the receipt of which is hereby acknowledged, hath granted, bargained, and sold, and hereby doth grant, bargain, sell, release, convey, and confirm, unto the said parties of the second part and their heirs and assigns

forever, all and singular the property and premises covered by the said mortgages—that is to say:

First. The property covered and conveyed by the Union
162 Trust Company mortgage, so called—that is to say, the forty-seven thousand nine hundred and fifty-eight and $\frac{4}{10}\frac{0}{0}$ acres of wagon-road lands, so called, being that portion of said lands particularly described in Exhibit C, attached to the Union Trust Company's bill of complaint, together with all the equity of redemption or other right or interest of said mortgagor corporation (The Lake Superior Ship Canal, Railroad and Iron Company) in the residue of the wagon-road lands described or referred to in said decree, and also all the equity of redemption or other right or interest of said mortgagor corporation, as covered by the same mortgage, in and to the residue of its property, namely, the said ship canal and corporate franchises and four hundred thousand acres of canal grant lands mentioned in said decree.

Secondly. All the property covered by said Birdseye mortgage, so called—that is to say, the two hundred thousand acres of land granted by the act of Congress of July 3rd, 1866, in aid of the construction of said canal and mentioned in said decree, together with the equity of redemption and all other right or interest of said mortgagor corporation as covered by the last-mentioned mortgage, in and to the said ship canal, corporate franchises, and the two hundred thousand acres granted in aid of the construction of said canal by the act of Congress of March 3rd, 1865, referred to in said decree.

Thirdly. The property covered by the said Sutherland mortgage—that is to say, the said ship canal and corporate franchises and the two hundred thousand acres of land granted in aid of the construction of said canal by said act of Congress of March 3rd, 1865, the said lands herein referred to and conveyed being the same as contained in the lists and descriptions thereof referred to in the said decree; and

163 Fourthly. All and singular the corporate rights and franchises of the said Lake Superior Ship Canal, Railroad and Iron Company, formerly known as the Portage Lake and Lake Superior Ship Canal Company, together with the said ship canal, being the property essential to the existence of said corporate rights, the said sales being made in conformity with the other directions of the said decree—that is to say, the sale of the said first parcel, except the said wagon-road lands, being made subject to the liens of the McCarter mortgage, so called, said Birdseye and Sutherland mortgages, and the receiver's certificates mentioned in said decree, and the sale of the said second parcel being made free of incumbrance, except as to the canal, corporate franchises, and land grant of March 3rd, 1865, the sale of which was made subject to the lien of said Sutherland mortgage, and the sales of the property and franchises covered by the said Sutherland mortgage, to wit, the third and fourth parcels above named, being made free from any incumbrance, together with all and singular the rights, privileges, hereditaments, and appurtenances to the same belonging or in anywise appertaining; to have and to hold the said premises above described

and hereby intended to be granted and conveyed unto the said parties of the second part and their heirs and assigns to and for their only proper use, benefit, and behoof forever.

In witness whereof the said party of the first part, master in chancery as aforesaid, has hereunto set his hand and seal the day and year first above written.

ADDISON MANDELL, [SEAL.]
*Master in Chancery, Circuit Court U. S.,*
*Eastern District of Michigan.*

Signed, sealed, and delivered in presence of—
HENRY RUSSELL.

164 STATE OF MICHIGAN, } ss:
*County of Wayne,* }

On the fourteenth day of May, A. D. 1877, before me, the undersigned, personally appeared Addison Mandell, a master in chancery of the circuit court of the United States for the eastern district of Michigan, in said State, known to me to be the person described in and who executed the above indenture, and acknowledged that he executed the same freely for the uses and purposes therein mentioned.

[NOTARIAL SEAL.] HENRY RUSSELL,
*Notary Public, Wayne County, Michigan.*

Received for record the 26th day of June, A. D. 1877, at 9 o'clock a. m.

THOS. D. MEADS, *Register.*

This indenture, made the fourteenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, between Addison Mandell, a master in chancery, duly appointed by the circuit court of the United States for the eastern district of Michigan, residing at Detroit, in said district, a party of the first part, and Albon P. Man and Nathaniel Wilson, parties of the second part, witnesseth:

Whereas, at a session of the circuit court of the United States for the eastern district of Michigan, in chancery, sitting at the district court room, in the city of Detroit, on the fifteenth day of June, in the year one thousand eight hundred and seventy-four, it was, among other things, ordered, adjudged, and decreed by said court, in a certain cause therein pending between Thos. N. McCarter, trustee,
complainant, and The Lake Superior Ship Canal, Railroad
165 and Iron Company, The Union Trust Company of New
York, George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said The Lake Superior Ship Canal, Railroad and Iron Company, defendants, that all and singular the mortgaged premises mentioned in the bill of complaint in said cause and in the mortgage therein described, or so much thereof as may be necessary to raise the amount due said complainant for the principal and interest and costs in said cause, be sold by or under the direc-

tion of one of the masters in chancery of said court at public auction in the county where the said mortgaged premises or the greater part thereof are situated, the said master first giving public notice of the time and place of said sale according to the course and practice of said court; which said decree was afterward affirmed on appeal by the Supreme Court of the United States on the thirteenth day of March, A. D. one thousand eight hundred and seventy-seven;

And whereas the undersigned, one of the masters in chancery of said court, and the said party of the first part to these presents, in pursuance of the order and decree of the said court, did, on the eleventh day of May, in the year one thousand eight hundred and seventy-seven, sell at public auction, at the front door of the court-house, in the village of Houghton, in the county of Houghton, in said eastern district of Michigan, the said mortgaged premises hereinafter particularly described, having first given six weeks' previous notice of the time and place of such sale, as required by the order and decree aforesaid, with a brief description of said mortgaged premises, at which sale the said premises were struck off to the said parties of the second part to these presents for the sum of one hundred dollars, that being the highest sum bidden for the same and they the highest
166 bidders therefor, said premises being subject to prior incumbrances amounting to one million six hundred and thirty-six thousand three hundred and eighty-five dollars and accrued interest at ten per cent.:

Now, therefore, this indenture witnesseth that the said master in chancery of said court and the party of the first part to these presents, in order to carry into effect the said sale so made as aforesaid, in pursuance of the said decree and order of the said court, and also by virtue of the statute in such case made and provided, and in consideration of the premises and of the sum of one hundred dollars paid by the said parties of the second part to these presents to the said party of the first part hereto, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm, unto the said parties of the second part and to their heirs and assigns forever all the following lands and premises, to wit, all and singular the corporate rights and franchises of the said Lake Superior Ship Canal, Railroad and Iron Company, formerly known as the Portage Lake and Lake Superior Ship Canal Company, together with the said ship canal, the same being the property essential to the exercise of such corporate rights, and also the said mortgaged four hundred thousand acres of land contained in two land grants described in the said bill of complaint and in the said notice of sale attached to the master's report of sale in said cause—that is to say, the lands described particularly in the lists and selections of parcels on file in this cause and also in the lists and selections made by the State agent of the State of Michigan, on file in the land offices at Washington, Lansing, and Marquette, the said land grants being of two hundred thousand acres
167 each, made in the years 1865 and 1866, respectively, by the United States to the State of Michigan to aid in the construc-

tion of said ship canal, and having been by the said State of Michigan granted to the Portage Lake and Lake Superior Ship Canal Company above-named, and by said company mortgaged, as set forth in said bill, together with all and singular the rights, titles, members, privileges, hereditaments, and appurtenances to the same belonging or in anywise appertaining; to have and to hold the said premises above described and hereby intended to be granted and conveyed unto the said parties of the second part, their heirs and assigns, to them and their only proper use, benefit, and behoof forever.

In witness whereof the said party of the first part, master in chancery as aforesaid, has hereunto set his hand and seal the day and year first above written.

ADDISON MANDELL, [L. S.]
*Master in Chancery, Circuit Court U. S.,*
*Eastern District of Michigan.*

Signed, sealed, and delivered in presence of—
HENRY RUSSELL.
HENRY M. CAMPBELL.

STATE OF MICHIGAN, } ss:
*County of Wayne,* }

On this fourteenth day of May, A. D. one thousand eight hundred and seventy-seven, before the undersigned, a notary public in and for said county, personally appeared Addison Mandell, a master in chancery for the circuit court of the United States for the eastern district of Michigan, in said State, known to me to be the person described in and who executed the above indenture, and acknowledged that he executed the same freely and for the uses and purposes therein mentioned.

Witness my hand and official seal.

HENRY RUSSELL,
[NOTARIAL SEAL.] *Notary Public, Wayne Co., Mich.*

168 Received for record the 26th day of June, A. D. 1877, at nine o'clock a. m.

THOS. D. MEADS, *Register.*

An indenture, made this fifteenth day of May, 1877, between Albon P. Man and Nathaniel Wilson, parties of the first part, and the Lake Superior Ship Canal, Railway and Iron Company, a corporation duly organized under and pursuant to the laws of the State of Michigan, party of the second part:

Whereas, at a sale made on the eleventh day of May instant by Addison Mandell, master in chancery, pursuant to certain decrees of the United States circuit court for the eastern district of Michigan, the said parties of the first part became the purchasers of the ship canal, land grants, franchises, and other property covered by certain mortgages described in said decrees, all of which will more fully appear by the deed of conveyance executed to them by the said Addison Mandell, master in chancery, as hereafter specified;

And whereas the said purchase was made for the purpose of organizing a new company and vesting the title to the said franchises and property in such company:

Now, this indenture witnesseth: That the parties of the first part, in consideration of the premises and the sum of one dollar to them in hand paid by the party of the second part—said party of the second part being such new company—the receipt of which sum is hereby acknowledged, have granted, bargained, sold, and conveyed unto the said party of the second part, its successors and assigns forever, all and singular the said ship canal, franchises, land grants, consisting of four hundred thousand acres of land granted
169 in aid of the construction of the said canal, and all other property so purchased by them, with the appurtenances, as fully and completely as the same have been conveyed to the said parties of the first part by the said Addison Mandell, master in chancery, in and by his deed thereof to them, bearing date the fourteenth day of May instant, and to which, for more particular and complete description of said property and premises, reference is hereby made; to have and to hold all and singular the above granted and described premises, with the appurtenances, unto said party of the second part, its successors and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ALBON P. MAN. [L. S.]
NATHANIEL WILSON. [L. S.]

Signed, sealed, and delivered in presence of—
HENRY RUSSELL.
JOS. M. WEISS.

STATE OF MICHIGAN, } ss:
*County of Wayne,* }

On this 15th day of May, A. D. 1877, before me, a notary public in and for said county, personally appeared the said Albon P. Man and Nathaniel Wilson, to me known to be the same persons described in and who executed the within instrument, who severally acknowledged the same to be their free act and deed.

Witness my hand and official seal.

[NOTARIAL SEAL.] HENRY RUSSELL,
*Notary Public, Wayne Co., Mich.*

Received for record the 26th day of June, A. D. 1877, at nine o'clock a. m.

THOS. D. MEADS, *Register.*

170 It was further shown that said three deeds were duly recorded in the office of the register of deeds of Marquette county, wherein said lands were situated, on the 21st day of August, 1879.

Plaintiff's counsel further introduced in evidence a transcript of the certificate of the Governor of the State of Michigan to the com-

pletion of the Portage Lake and Lake Superior ship canal, duly certified by the secretary of state of the State of Michigan, of which the following is a copy:

STATE OF MICHIGAN,
EXECUTIVE OFFICE, LANSING, *June* 25, 1875.

Whereas, by certain acts of the Congress of the United States, lands were granted to the State of Michigan to aid in the construction of a ship canal and harbor from Portage Lake to Lake Superior;

And whereas, by an act of the Legislature of the State of Michigan, said grant of lands was subsequently accepted by said State and were granted and conferred upon the Portage Lake and Lake Superior Ship Canal Company, a corporation organized under and by virtue of the laws of the State of Michigan, and whose name was afterward changed to that of the Lake Superior Ship Canal, Railroad and Iron Company;

And whereas I have received a certificate of the engineer, duly appointed under said last-named act, certifying that said Lake Superior Ship Canal, Railroad and Iron Company has completed the said canal and harbor in conformity with the plans and specifications therefor and in pursuance of said acts of Congress;

And whereas I have heretofore appointed Charles E. Holland, Esq., of Houghton, in this State, my agent to inspect said work after completion and to determine whether said canal and harbor
171 have been constructed as required by said act, who has duly made report to me;

And whereas I have made a personal examination of said canal and harbor, and have found the same to be constructed and completed in accordance with the terms and requirements of said acts of Congress and said act of the Legislature of the State of Michigan:

Now, therefore, I, John J. Bagley, Governor of the State of Michigan, do hereby determine that said canal and harbor have been constructed by said company as required by said act of Congress and in conformity with the plans and specifications therefor, and do accordingly hereby certify the same to said company.

In witness whereof I have hereunto set my hand and caused the great seal of the State of Michigan to be affixed this twenty-
[L. S.] fifth day of June, in the year of our Lord one thousand eight hundred and seventy-five.

JNO. J. BAGLEY.

By the Governor:
E. G. D. HOLDEN,
*Secretary of State.*

STATE OF MICHIGAN, *ss:*

OFFICE OF THE SECRETARY OF STATE.

I, Wm. Jenney, secretary of state of the State of Michigan, do hereby certify that I have compared the annexed copy of certificate of completion of a ship canal and harbor from Portage Lake to Lake Superior with the original deposited in this office July 2nd, 1875,

and that it is a true and correct transcript therefrom and of the whole of such original.

Great Seal of the State of Michigan.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Michigan, at Lansing, this fifth day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

WM. JENNEY,
*Secretary of State.*

172 Plaintiff's counsel also introduced evidence that a duplicate of said certificate was duly filed with the register of deeds for the county of Houghton at about the time of the filing thereof with the secretary of state.

Plaintiff's counsel further introduced in evidence the certificate of the Governor of the State of Michigan dated November 29, 1873, together with the report of Charles E. Holland, Samuel Wright, and John H. Forster upon the subject of the completion of said canal, of which the following are copies:

EXECUTIVE OFFICE, LANSING, *November* 29, 1873.

Whereas I have received the certificate of John H. Forster, engineer, duly appointed under section three of act 216 of the laws of this State for 1865, entitled "An act to accept a grant of land by act of Congress to aid in the construction of the said ship canal and harbor at the head of Portage Lake to connect with Lake Superior and to provide for the construction of the same," which certificate sets forth that the Portage Lake and Lake Superior Ship Canal Company mentioned in said act (said company being now known as the Lake Superior Ship Canal, Railroad and Iron Company) has completed the canal mentioned in said act in pursuance of the act of Congress and in conformity with the plans and specifications;

And whereas I have heretofore appointed Charles E. Holland, Esq., of Houghton, in this State, my agent to inspect said work after completion and to determine whether said canal and harbor are constructed as required by said act, who has made a report to me upon the subject;

And whereas I have made a personal examination of said canal and harbor, and have found the same to be constructed and
173 completed, so far as the building of said canal and harbor is concerned, by said company as required by said act of Congress and in conformity with said plans and specifications, except that the legal title to the lands on which said canal is built is not vested in said company, but such legal title has been taken to certain persons individually, who are officers of said company, and that certain of said lands are subject to incumbrance, and that in respect to such title and in consequence of said title not being in said company the said canal and harbor are not constructed and completed in accordance with the act of Congress;

And whereas it is represented to me that measures will be taken without delay to vest the said legal title to said land in said com-

pany, and thereby to make the construction of said work complete, and it is desired that I certify to so much as I can lawfully certify in advance thereof:

Now, therefore, I, John J. Bagley, Governor of the State of Michigan, deem it proper to certify the foregoing facts to the said Lake Superior Ship Canal, Railroad and Iron Company, to the end that they may use the same as they shall be advised may be necessary for the protection of their rights and of the rights of all parties interested in the premises, but without prejudice to any rights or interests of the State of Michigan arising out of said land grant and said laws dependent directly or indirectly on the conditions of the title of said lands on which said canal and harbor are built and which are to be used in connection therewith as a part of said public work, it not being my design that this shall stand as the final and absolute certificate of completion required by section four of said statutes, and which final certificate will not be due until such
174 title to the lands acquired by the said canal and harbor is made good.

In witness whereof I have set my hand and caused the great seal of the State of Michigan to be affixed this 29th day of November, A. D. 1873.

(Signed) JNO. J. BAGLEY.

By the Governor:

——— ———,

*Secretary of State.*

Mineral Range Railroad Company, general office.

HANCOCK, MICH., *Oct.* 15, 1873.

Governor John J. Bagley, Lansing, Mich.

SIR: In compliance with your wish, expressed in your esteemed favor of the 8th inst., that I make a final examination of the Portage Lake and Lake Superior ship canal, I have now the honor to report that, as stated in a former letter, I have been unable to examine the details of the work in person, owing to the pressure of other business. I have, however, very recently passed over the entire work and closely noted all that portion above water, including the piling and piers.

At my request Mr. Samuel Wright, engineer in charge of the Mineral Range railroad, after a careful perusal of the specifications, has made a careful examination of the work, accompanied by the State engineer, Hon. J. H. Forster. I beg leave to submit herewith Mr. Wright's report to me for your inspection, and to remark that I have every confidence in the judgment of Mr. Wright, and should be inclined to give his opinion more weight than my own.

175 I find also that the work in many respects is very much better than the specifications demand in consequence of the modifications made on the part of the State, which has caused a much larger expenditure of money on the part of the parties con-

structing the work than the original specifications demanded; all of which expenditures have been in the interest of the State.

From all these facts I am led to the conclusion that the work has been fully completed according to the original specifications as modified by the State engineer, and would therefore recommend the acceptance of the work as fully completed. I have incurred no expense in this examination, but would be glad to have you remit to Mr. Wright, say, fifty dollars for his services.

I remain, with great respect, very truly yours,

CHARLES E. HOLLAND.

Mineral Range railroad, general office.

HANCOCK, MICHIGAN, *Oct.* 15, 1873.

Mr. C. E. Holland.

SIR: In compliance with your request I have inspected the Portage Lake and Lake Superior ship canal, with a view to a report on the condition of that work.

On the 13th inst. I accompanied the State engineer, J. H. Forster, Esq., through the canal by tug, examined with him the piers at the Lake Superior entrance and the piling and docking of the main canal, and took soundings fairly covering the area of the canal from Portage Lake to Lake Superior, completing my examinations on the morning of the 14th instant.

I found the work in all respects substantial and sufficient, corresponding to the specifications, except where those had been
176 changed or modified by the direction of the engineer, as provided for in the terms of the specifications. I found complete depth of water in the canal.

In my opinion you are justifiable in reporting the work completed and acceptable.

I received courteous assistance and full explanations from Mr. Forster, and every facility for thorough examination was extended by the officers of the company. I am especially under obligations to Mr. Muloch, superintendent of the work, who made soundings, greatly facilitating the work of inspection.

I have the honor to be, very respectfully,

SAMUEL WRIGHT.

HOUGHTON, *Oct.* 18*th*, 1873.

I hereby certify that the Portage Lake and Lake Superior ship canal is completed according to law; that the plans and specifications approved by Governor Crapo have been substantially complied with; that the modifications made by the State engineer in charge and approved by Governor Baldwin and your excellency have been of great benefit to the works, and that the canal and breakwater, in extent and solidity, in depth of water, in width of channel-ways, in length of piles, and extent of sheet piling, are much in excess of the requirements of the official specifications. I therefore accept the canal.

Most respectfully, JOHN H. FORSTER,

*Engineer of State.*

To his excellency Governor John J. Bagley, Detroit, Michigan.

177 WILLIAM H. BEALS, a witness sworn on the part or the plaintiff, testified that he was a woodsman in the employ of the plaintiff, engaged in looking over and examining its lands; that he and five others in the employ of the plaintiff first went over the lands of the plaintiff involved in these suits, together with the other lands of the plaintiff in that locality, in the latter part of December, 1885, and the early part of 1886 for the purpose of estimating the timber; that at that time they went over all the sections of the lands of the plaintiff in that locality, including the lands involved in these suits, and estimated the amount of timber thereon; that he had also been over said lands in the spring of 1889 with one McColeman, who was also in the employ of the plaintiff.

On cross-examination he testified that he was personally upon the descriptions of lands involved in these suits, to wit, the southwest quarter of section twenty-five (25) and the northeast quarter of section thirteen (13), township forty-four (44) north of range thirty-six (36) west; that he marked his name upon the trees at the corners of each tract; that in making such examination they generally examined and estimated one section a day.

ZEBINA MCCOLEMAN, a witness sworn on the part of the plaintiff, testified that he was in the employ of the plaintiff in examining lands and estimating timber, and had been in its employ a considerable portion of the time for about eight years; that he had been over the lands of the plaintiff in township 44 north of range 36 west, including the lands involved in these suits; that the first time he was over said lands was in May, 1888.

178 HERBERT ARMSTRONG, a witness sworn on the part of the plaintiff, testified that he was surveyor and land-looker, and had been in the employ of the plaintiff for about ten years; that he had examined the lands of the plaintiff in township 44 north, of range 36 west, and other lands in that vicinity embraced in the canal land grant, for the purpose of ascertaining whether any trespasses had been committed; that in the year 1884 he was over all said lands, including the lands involved in these suits, for the purpose of examining if trespasses had been committed, and also over the same lands in 1885 for the same purpose and for ascertaining whether there was any evidence of homesteaders making settlements thereon; and he also examined said descriptions particularly in 1886 for trespasses and measured up some trespass that had been committed the previous winter; that he was also over the lands in 1886 and 1887 and found lumber shanties there and some parties logging; that he and those who were with him in the employ of the plaintiff also estimated the damages that had been done on these and adjoining lands of the plaintiff by fire that had been communicated from the railroad, and looked these lands over carefully at that time and also in 1888; that during the different years since he began examining these lands he had probably spent something like a week or ten days on each of the quarter sections in question; in

the years 1885, 1886, and 1887 he was there three or four different times.

Upon cross-examination he testified that in the year 1884 he ran the lines around the southwest quarter of section 25, township 44 north, of range 36 west; that in the fore part of June, 1885, he was there again; that he had a list of pre-emption filings that had been offered on lands of the plaintiff and looked for evidence
179 of buildings, among others the southwest quarter of section 25; that in June, 1885, he found a little piece of ground cleared and a small shanty built upon said piece of land and a few potatoes planted; that the shanty was about 10 x 12 and about six feet high at the eaves, but it was doubtful whether people could live in it; that they might live in it if it was chinked up and a good roof put on it; that he found no one living on the land; that he and another employé of the plaintiff were together at the time; that they disturbed nothing that they found there; that he was there again in the spring of 1886 and found the same improvements as before, but no one living there. He visited the place again in July, 1886, and observed no change, as far as improvements were concerned, and there was nothing to show that the party who had made the improvements had been there since or done any work; that some lumbermen's shanties had been built on said description of land before, but he did not know by whose authority; that in the spring of 1887 said shanties and also the homesteader house *was* destroyed by fire.

Upon re-examination he testified that when he was on the southwest quarter of section 25, in township 44 north, of range 36 west, in the years 1885 and 1886, the shanty he referred to was not finished; that there were some poles laid in part of it for a floor and a sort of pole roof; that there was some brush in one end of it, and it looked as if somebody might have slept in it a few nights.

Plaintiff's counsel also introduced evidence to show that the lands involved in these suits had been assessed for taxes in the township where the same were situated for State, county, township,
180 and other taxes, from the year 1880 to and including the year 1888, to the plaintiff in this case, and that the taxes thereon had been paid by the plaintiff, to wit, the southwest quarter of section 25, town. 44 north, of range 36 west, $187.26, and on the northeast quarter of section 13, township 44 north, of range 36 west, $361.19.

It was admitted on the part of the defendants that the defendant Walter Cunningham was in the actual possession of the southwest quarter of section 25, township 44 north, of range 36 west, on and before the 23rd day of July, 1885, the date of the commencement of the suit against him, and that the defendant Hugh Finan was in the actual possession of the northeast quarter of section 13, township 44 north, of range 36 west, on and before the 21st day of March, 1889, the date on which the suit against him was commenced.

Defendants' counsel, to maintain and prove the issue on the part of the defendants, offered in evidence the order of the Governor of

the State of Michigan, dated October 4th, 1867, of which the following is a copy:

STATE OF MICHIGAN,
EXECUTIVE OFFICE, FLINT, *Oct. 4th*, 1867.

Hon. O. L. Spaulding, secretary of state.

SIR: Let a commission issue to P. J. Avery, of Marquette, Mich., to be an agent to select two hundred thousand acres of public lands in subdivisions, agreeably to the United States survey, from
181 any lands in the upper peninsula of this State, subject to private entry in conformity with the provisions and under the restrictions of an act of Congress entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," approved July 3rd, 1866.

HENRY H. CRAPO, *Governor.*

Plaintiff's counsel objected thereto on the ground that it was irrelevant, and because under the act of 1866 selections of land were to be made by the agent of the State and finally approved by the Secretary of the Interior; and, it being in evidence that the list made by the agent had been so approved and certified to the State, it is immaterial what these selections were or what the commission was, which objection was overruled by the court and plaintiff's counsel excepted.

Defendants' counsel further gave evidence to show that the Ontonagon and State Line Railroad Company became incorporated under the laws of the State of Michigan August 20th, 1856, and that the Marquette and State Line Railroad Company was incorporated under the laws of said State on the 16th day of January, 1857. It also appeared from said evidence that neither of these corporations surveyed any line or filed any map; that they were skeleton companies organized to receive from the State the grant of lands made by act of Congress, approved June 3, 1856, granting lands for the construction of lines of railroad from Marquette and Ontonagon to the Wisconsin State line.

Defendants' counsel further offered in evidence a letter from the Commissioner of the General Land Office dated December 3rd, 1857, of which the following is a copy:

182 GENERAL LAND OFFICE, *December* 3, 1857.

P. H. Smith, Esq. (care of Brown's Hotel), Washington, D. C.

SIR: I have to acknowledge the receipt at this office on the 30th ultimo of your letter of the 27th ult., with the map certified in due form of the definite location of the line of route of the "Chicago, St. Paul & Fond du Lac railroad" from Fond du Lac, on Lake Winnebago, northerly to the State line, filed in view of the railroad grant to Wisconsin by act of Congress approved 3 June, 1856, which has been accepted as the basis of adjustment; also map properly certified of the lines of route of the said road as finally located from Ontonagon and Marquette to the State line and Brule river, filed in

view of the railroad grant to Michigan by act of Congress approved June 3, 1856.

The map of the line of route of the road from Ontonagon to the State line at Brule river will be accepted as the basis of the adjustment, but the line of route of the road from Marquette to the State line, Brule river, as indicated on the map, shows so great a deflection from a direct line between the points mentioned in the law that we must defer all action thereon until the company shall produce such authentic data as will show, first, that a direct route between the terminii is impracticable; and, next, that the existing route is the most direct practicable one that can be constructed between the points fixed in the law.

The showing should be the affidavit of the engineer who
183 made the explorations and directed the surveys and a sworn copy of the report of the explorations.

Resp'y your ob'd't ser't,

THOS. A. HENDRICKS,
*Commissioner.*

In connection with the above offer, defendants' counsel called attention to the act of Congress approved June 3, 1856, granting lands to the State of Michigan to aid in the construction of certain railroads, and the above offer was made as one step in the chain of evidence to be offered for the purpose of showing that the lands involved in these suits were embraced in said railroad grant, and that the title thereto did not pass to the plaintiff under the grant for the construction of the Portage Lake and Lake Superior ship canal.

Plaintiff's counsel objected to said evidence as incompetent, and also for the reason that the certification of land to the State for the construction of said canal, under the powers and jurisdiction by the canal act vested in the Secretary of the Interior, cannot be defeated by any action that may have been taken under the railroad act of June, 1856; also that the title and right conferred by the certification of the land under the canal act of July 3rd, 1866, cannot be defeated or attacked by these defendants, who do not connect themselves with any title of the State or of the United States.

Said objection was overruled by the court, and plaintiff's counsel excepted, and said evidence was received.

Evidence was also offered, subject to the same objections, to show that the route of the railroad from Ontonagon to the State line was accepted by the Secretary of the Interior April 7th, 1858.

184 The court overruled said objections, said evidence was received, and plaintiff's counsel excepted.

Defendants' counsel further offered in evidence a copy, duly certified from the General Land Office, of a survey of a railroad line from Marquette and Ontonagon to the State line, filed by the Chicago, St. Paul and Fond du Lac Railroad Company, a copy of which is hereto annexed, marked Exhibit A.

Plaintiff's counsel objected thereto as one step in the direction of

intent to defeat the title of the plaintiff, as being incompetent, and for the reasons above given.

Said objection was overruled by the court, and the evidence was received, to which plaintiff's counsel excepted.

Defendants' counsel further offered in evidence a certificate of the Commissioner of the General Land Office, and approved by the Secretary of the Interior, which accompanies a list of lands (none of which are involved in these suits) certified to the State of Michigan to aid in the construction of a railroad from Marquette to the Wisconsin State line, of which the following is a copy.

Attached to said certificate was a list of lands embracing 112,145.38 acres.

GENERAL LAND OFFICE, *December* 10, 1861.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to eighteen, inclusive, is a true and correct list of the tracts of land within the six-mile limits granted to the State of Michigan by the act of Congress approved 3rd June, 1856, entitled "An act making a grant of alternate sections of the public lands to the State of Michigan to
185 aid in the construction of certain railroads in said State, and for other purposes," being the vacant and unappropriated lands in the alternate sections designated by odd numbers for six sections in width on each side of that part of the grant by said act of 3rd June, 1856, to the State of Michigan to aid in ~~the~~ construction of a railroad from Marquette to the Wisconsin State line, and known as the Chicago, St. Paul & Fond du Lac railroad, being also the vacant and unappropriated lands in the alternate sections designated by odd numbers of the granted sections in place within the six-mile reserve within the State of Michigan, and they are now submitted for the approval of the Secretary of the Interior in accordance with the requirements of said act of 3rd June, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first herein above written.

(Signed) J. M. EDMUNDS,
*Commissioner.*

DEPARTMENT OF THE INTERIOR, *December* 12, 1861.

Approved, subject to the conditions and rights above mentioned.

(Signed) CALEB B. SMITH, *Secretary.*

Plaintiff's counsel objected thereto as incompetent and, for the reasons above given, as objections to the evidence offered by defendants for the purpose of defeating plaintiff's title. Said objection was overruled by the court, and the plaintiff's counsel excepted.

186 Defendants' counsel further offered in evidence a certified list of lands approved by the Secretary of the Interior, containing a total of 142,430.23 acres, of which the following is a copy

(omitting all descriptions other than those which embrace the lands involved in these suits), to wit:

Lands certified to State for Ontonagon and State line road (clear), six-mile limits.

List No. 18. Approved December 12, 1861.

Chicago, St. Paul and Fond du Lac railroad, six-mile limits, Marquette district, Michigan. Approved December 12th, 1861.

Certified copy furnished James H. Howe, Esq., May 17th, 1870, pursuant to his letter of April 19, 1870.

Chicago, St. Paul and Fond du Lac railroad.

List of lands in the district of lands subject to sale at Marquette within the six-mile limits granted to the State of Michigan by the act of Congress approved the 3rd June, 1856, entitled "An act granting public lands in alternate sections to aid in the construction of railroads in said State, being the vacant and unappropriated lands in the alternate sections designated by odd numbers for six sections in width on each side of the railroad from Ontonagon to the Wisconsin State line."

North of base line and west of principal meridian.

Chicago, St. Paul and Fond du Lac railroad to Ontonagon, six-mile limits, railroad list, Marquette district, Michigan.

| No. | Parts of section. | Section. | Township. | Range. | Acres. | Remarks. |
|---|---|---|---|---|---|---|
| * | * | * | * | * | * | * |
| 195 | E. ½ of | 13 | 44 | 36 | 320 | Vol. 29, p. 121. |
| 205 | All of | 25 | 44 | 36 | 640 | Vol. 29, p. 127. |
| * | * | * | * | * | * | * |

187 GENERAL LAND OFFICE, *December 10th*, 1861.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to eighteen, inclusive, is a true and correct list of the tracts of land within the six-mile limits granted to the State of Michigan by the act of Congress, approved 3d June, 1856, entitled "An act making a grant of alternate sections of the public lands to the State of Michigan to aid in the construction of certain railroads in said State and for other purposes," being the vacant and unappropriated lands in the alternate sections designated by odd numbers for six sections in width on each side of that part of the grant by said act of 3d June, 1856, to the State of Michigan to "aid in the construction of a railroad from Ontonagon to the Wisconsin State line," and known as the Chicago, St. Paul and Fond du Lac Railroad, being also the vacant and unappropriated lands in the alternate sections designated by odd numbers of the granted sections in place within the

six-mile reserves within the State of Michigan, and they are now submitted for the approval of the Secretary of the Interior in accordance with the requirements of said act of 3d June, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first herein above written.

J. M. EDMUNDS,
*Commissioner.*

188 DEPARTMENT OF THE INTERIOR, *December 12th*, 1861.

Approved, subject to the conditions and rights above mentioned.

CALEB B. SMITH, *Secretary.*

Plaintiff's counsel objected thereto as testimony offered for the purpose of attacking plaintiff's title as incompetent and for the reasons above given; which objections were overruled, the evidence received, and plaintiff's counsel excepted thereto.

Defendants' counsel further offered in evidence a certified list of lands containing 41,649.25 acres (none of which lands were involved in these suits) of which the following is a copy, omitting the descriptions of lands:

*Certified List of Lands Granted in the Six-Mile Limit of Ont. and State Line and Mar. and S. L. where They Intersect.*

List No. 20. Approved Dec. 12, 1861.

Completed and checked with list of relinquishment by Governor and company. Filed July 9, 1868.

T. C.

(Posted —— 12th, 1861. J. V. P.) Ex'd July 11, '68.

Chicago, St. Paul and Fond du Lac railroad where the two branches to Marquette and Ontonagon intersect and cross each other.

List of lands in the district of lands subject to sale at Marquette within the six-mile limits granted to the State of Michigan by the act of Congress approved the 3rd June, 1856, entitled "An act granting public lands in alternate sections to the State of Michigan to aid in the construction of certain railroads in said State, being the vacant and unappropriated lands in the alternate sections designated by odd numbers for six sections in width on
189 each side of the railroad" from Marquett and Ontonagon to the Wisconsin State line where the two branches of said road intersect and cross each other.

North of base line and west of principal meridian.

Chicago, St. Paul and Fond du Lac railroad where the two branches from Marquette and Ontonagon intersect and cross each other.

Six-mile limits, railroad list, Marquette district, Michigan.

* * * * * * *

GENERAL LAND OFFICE, *December 10th*, 1861.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to six, inclusive, is a true and correct list of the tracts of land within the six-mile limits granted to the State of Michigan by the act of Congress approved 3d June, 1856, entitled "An act making a grant of alternate sections of the public lands of the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes," being the vacant and unappropriated lands in the alternate sections designated by odd numbers for six sections in width on each side of that part of the grant by said act of June 3rd, 1856, to the State of Michigan to aid in the construction of railroads from Marquette and Ontonagon to the Wisconsin State line and known as the Chicago, St. Paul and Fond du Lac railroad where the two branches of said road intersect and cross each other, being also the vacant and unappropriated lands in the alternate sections designated by odd numbers of the granted sections in place within the six-mile reserves within the State of Michigan, and they are now submitted for the approval of the Secretary of the Interior, in
190 accordance with the requirements of said act of 3d June, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first hereinabove written.

J. M. EDMUNDS,
*Commissioner.*

DEPARTMENT OF THE INTERIOR, *December 12th*, 1861.

Approved, subject to conditions and rights above mentioned.
CALEB B. SMITH, *Secretary.*

Plaintiff's counsel objected thereto as evidence offered for the purpose of attacking plaintiff's title and for the reasons above given; which objections were overruled by the court and the evidence received; to which plaintiff's counsel excepted.

Defendants' counsel further offered in evidence a letter of the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated May 29th, 1873, ordering the restoration of certain lands to market, of which the following is a copy (omitting the descriptions of land).

Said descriptions of land covered a large proportion of those certified to the State in the two railroad lists last above mentioned, but embrace no descriptions of land covered by the certification to the State of Michigan under the congressional land grant of July 3rd, 1866.

And said defendants' counsel offered in evidence, in connection with said order of restoration, a telegraphic countermand of said order, dated July 30th, 1873, of which copy is given following said notice of restoration.

191 *Notice of Restoration.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *May 29th*, 1873.

Register and receiver, Marquette, Mich.

GENTLEMEN: I transmit herewith a list of lands formerly withdrawn from market and approved to the State for the benefit of the Ontonagon and Marquette Branches of the Chicago, St. Paul and Fond du Lac railroad and outside of the 20-mile limits of the Marquette, Houghton and Ontonagon R. R.

The same having been duly relinquished by the State will be restored to their original condition prior to withdrawal.

In order to carry the restoration into effect you will give notice by publication in the newspaper having the largest circulation in your district that upon a day to be fixed by you and not less than thirty days from date of notice the described tracts will again become subject to pre-emption, homestead, and private entry at $1.25 per acre.

This notice you will cause to be published not less than once a week for four consecutive weeks, the same to be paid for by the receiver as disbursing agent, he entering it in his proper account and sending as voucher a copy of the notice with publisher's certificate of publication and his receipt for payment. You will also, immediately upon publication, send a copy of the paper containing the notice to this office that we may be made aware of the date of restoration.

It appears from your returns that you have already allowed a number of entries of these lands without authority from this
192 office. These will be submitted to the board established for equitable adjudication, but you will not permit any further entries until the date of restoration or recognize any pre-emption claims initiated prior to that time.

The tracts to be restored are the following, to wit:

* * * * * * *

Very respectfully,

W. W. CURTIS,
*Acting Commissioner.*

*Countermand of Notice.*

(Telegram.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 30, 1873.

Register and receiver, Marquette, Michigan.

GENTLEMEN: Suspend restoration ordered twenty-ninth May, and hold the lands withdrawn until further orders. Answer.

WILLIS DRUMMOND,
*Commissioner.*

Plaintiff's counsel objected thereto as evidence offered for the purpose of defeating the plaintiff's title and for the reasons before given, and for the further reason that said documents are dated, one the 29th of May, 1873, and the other on the 30th of July, 1873, long before which time, to wit, May, 1871, the lands for which these actions are brought had been certified to the State for the benefit of the canal company; which objection was overruled by the court and said evidence was received and plaintiff's counsel excepted thereto.

193 Defendants' counsel also offered in evidence the report of the Secretary of the Interior to the Speaker of the House of Representatives, dated March 11th, 1878, of which the following is a copy:

*Letter from the Secretary of the Interior Transmitting Information Concerning Lands Granted to the State of Michigan for Railroad Purposes.*

April 16, 1878.—Referred to the Committee on Public Lands and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April* 12, 1878.

SIR: I have the honor to transmit herewith for the consideration of Congress copy of letter addressed to me on the 11th ultimo by the Commissioner of the General Land Office (and accompanying map and papers) concerning lands granted by Congress to the State of Michigan to aid in the construction of a railroad from Ontonagon to the Wisconsin State line.

Very respectfully your obedient servant,

C. SCHURZ, *Secretary.*

Hon. S. J. Randall, Speaker of the House of Representatives.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 11, 1878.

SIR: Under date of 15th July, 1873, your predecessor, the Hon. C

Delano, referred to this office for report as to the facts in the premises a letter from the Governor of Michigan (Hon. J. J. Bagley), dated July 10, 1873, relative to certain lands in the Marquette district.

I have the honor to submit the following in reply:

194 It appears upon examination that by act of June 3, 1856 (11th Statute, p. 21), it was enacted—

That there be, and hereby is, granted to the State of Michigan to aid in the construction of railroads from Little Bay de Noquet to Marquette and thence to Ontonagon and from the two last-named places to the Wisconsin State line every alternate section of land designated by odd numbers for six sections in width on each side of said roads.

It is also provided, further, that the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever.

By section 3 it was further enacted—

That the said lands hereby granted to the said State shall be subject to the disposal of the Legislature thereof for the purposes aforesaid and no other, etc.

By act of the Legislature of the State of Michigan approved February 14, 1857 (Session Laws, p. 346), the lands granted to the State in Upper Michigan were disposed of as follows, to wit:

"To aid in the construction of a railroad from Marquette to the Wisconsin State line, to be fully and completely vested in the Marquette and State Line Railroad Company."

"To aid in the construction of a railroad from Ontonagon to the Wisconsin State line, to be vested in the Ontonagon and State Line Railroad Company."

"To aid in the construction of a railroad from Little Bay de Noquet to Marquette, to be vested in the Bay de Noquet and Marquette Railroad Company; and in like manner to aid in the con-

195 struction of a railroad from Marquette to Ontonagon, to be vested in the Marquette and Ontonagon Railroad Company."

Two of these railroads were projected to run from a point on the Brule river, at or near the Wisconsin State line, northerly, the one running to Marquette, known as the Marquette and State Line railroad, the other running to Ontonagon, known as the Ontonagon and State Line railroad, substantially as shown on the map of projected routes, herewith enclosed.

The act of February 14, 1857, before mentioned, provided, further, that in case any of the above-named companies failed to complete the entire line of road within seven years from November 15, 1857, or to comply with other conditions specified in said act, then, in that event, the board of control should declare the lands granted to such defaulting railroad company to be forfeited to the State, and said board of control, consisting of the Governor of the State and six commissioners, provided for in said act, should confer said lands

upon some other competent party, under the general regulations and restrictions of said act.

On April 24, 1862, the said board of control, on the petition of the Peninsula Railroad Company, indorsed by the Chicago and Northwestern Railroad Company, declared the grant to the Marquette and State Line Railroad Company forfeited to the State of Michigan and conferred said grant upon the Peninsula Railroad Company, and subsequently, upon a doubt having been raised as to the power of the board to act in the premises, the action of said board of control was indorsed and the grant made by the board to the Peninsula Railroad Company was confirmed by the Legislature of the State of Michigan per act of March 18, 1863.

By joint resolution No. 38 of July 5, 1862 (Statutes 12, p.
196 620), Congress authorized a change of route and terminus of the Marquette and State Line railroad, permitting said railroad company to relocate its line so as to run from "Marquette to a point near the mouth of the Menominee river, on the Wisconsin State line, and touching at favorable points on Green Bay," &c.

In joint resolution No. 38, changing the route and terminus of the Marquette and State Line railroad, in the petition of the Peninsula Railroad Company, in the action of the board of control had thereon, and in the subsequent confirmation of the action of the board of control by the Legislature of the State of Michigan conferring the grant made to the Marquette and State Line Railroad Company upon the Peninsula Railroad Company no mention is made of the grant made to the Ontonagon and State Line Railroad Company.

The Chicago and Northwestern Railroad Company, by articles of consolidation, dated October 23, 1864, succeeded to the "rights, powers, franchises, immunities, privileges, lands, and property theretofore possessed by said Peninsula Railroad Company."

Upon applying as such successor for a withdrawal of the lands along the new line, as located from the new terminus on the Menominee river to Marquette, the Chicago and Northwestern Railroad Company was required to relinquish to the State of Michigan and to procure from the Governor of Michigan a relinquishment to the United States of all the lands originally withdrawn from both the Marquette and State Line and the Ontonagon and State Line railroads. (See letter from the Commissioner of the General Land Office to J. H. Howe, Esq., solicitor for the Chicago and Northwestern Railroad Company, dated July 13th, 1868; copy inclosed herewith.)

On October 8, 1870, a deed of relinquishment from the Chicago and Northwestern Railroad Company to the State of Mich-
197 igan and also a deed of relinquishment from the Governor of Michigan to the United States of the lands originally withdrawn from the Ontonagon and State Line Railroad Company was filed in and accepted by this office.

The recital in said deeds does not set up title in the Chicago and Northwestern Railroad Company in and to the lands thereby relinquished; neither does it show authority upon the part of the Governor of Michigan to make a valid deed of relinquishment to said

lands on behalf of the State of Michigan, said recital being the same as the recital in the deeds of relinquishment made May 1, 1868, by said Chicago and Northwestern Railroad Company and the Governor of Michigan of the lands originally granted on the line from Marquette to the Wisconsin State line, which lands, as stated above, had been duly conferred upon the Peninsula Railroad Company and its successors by action of the board of control duly had and consequently confirmed by the act of Legislature of the State of Michigan.

Nevertheless, acting upon the hypothesis that the said deeds of relinquishment were valid, a restoration of the lands originally withdrawn for both the Marquette and State Line and the Ontonagon and State Line railroads were ordered by this office, and notice of the same was given by the local officers at Marquette land office June 27, 1873, to take effect August 6, 1873.

Upon receipt of the inclosed letter from Governor Bagley, the said restoration was suspended by telegram of July 30, 1873 (receipt acknowledged at the local office August 1, 1873), and upon an examination of the case it appears, in my opinion, that my predecessor erred in demanding deeds of relinquishment of the lands granted for the Ontonagon and State Line Railroad Company from the Chi-
198 cago and Northwestern Railroad Company and the Governor of Michigan, as there does not appear to have been any action taken either by the board of control or the State Legislature to transfer the grant originally made for the Ontonagon and State Line railroad to the said Chicago and Northwestern Railroad Company or to authorize the Governor of Michigan to make such a deed, and the title to said lands appears to be in the State of Michigan under the original grant per act of June 3, 1856, and the subsequent approval made thereunder, as stated in the inclosed letter of Governor Bagley, except such portion thereof as has since been granted to the Marquette and Ontonagon Railroad Company.

In view of the fact that the railroad from Ontonagon to the Wisconsin State line has not been built and of the terms of the granting act of 1856 and the confirmatory act of the Michigan Legislature of February 14th, 1857, the grant originally made for said road became liable to reversion more than ten years since, and in view of the further fact that neither the State Legislature nor the board of control have ever conferred the said grant upon any other party or parties, and that at present there is no party or corporation *in esse* proposing to build a railroad upon this line, I would respectfully recommend that the attention of Congress be called to the present status of these lands with a view to such action as may be necessary to restore the same to market.

Owing to the change of officers in this bureau and the pressure incident to the inadequate force of the office, this report has been unavoidably delayed until the present.

Very respectfully,

J. A. WILLIAMSON,
*Commissioner.*

Hon. Carl Schurz, Secretary of the Interior.

199 Plaintiff's counsel objected thereto for the reasons above given; which objection was overruled by the court and said evidence was received, and plaintiff's counsel excepted.

Defendants' counsel further introduced in evidence certain letters of the Commissioner of the General Land Office, addressed to the register and receiver of the land office at Marquette, Michigan, of which the following are copies:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, *March* 7, 1879.

Register and Receiver, Marquette, Michigan.

GENTLEMEN: Replying to your inquiry of Sept. 9, 1878, relative to the status of section 29, 47 N., 41 W., Michigan, I have to inform you that an examination of the records of this office show that by letter of July 14th, 1866, all the vacant odd-numbered sections in the Upper Peninsula of Michigan west of the line dividing range 15 and 16 west were withdrawn from the Lac La Belle Ship Canal Company.

By letter of July 1, 1864, the above withdrawal was continued for the benefit of the Portage Lake and Lake Superior Ship Canal Company, and you were directed to withhold from entry for 90 days the odd-numbered sections in townships 41, 42, and 43 north, of ranges 29, 30, 31, and 33 west, and townships 41, 42, and 43 north, of range 33 (?) west, in order to enable the agent of the State to select, for the benefit of said company, the residue of lands inuring to that company under its grant.

By letter of June 5, 1874, you were informed "that the limits of said withdrawal was confined to that portion south of the
200 line dividing 40 and 41 north and west of the line dividing 15 and 16 west."

The language of said letter is as follows:

"There is understood to be still withheld in addition to the particular lands withdrawn by letter of the 1st instant."

By letter of December 1, 1874, George S. Frost, agent of the State of Michigan, consented that the above suspension should be removed and stated that he would make the selections necessary to complete the grant from lands already in the market, and by letter of December 22, 1874, you were directed to restore to market the vacant and unappropriated lands within the limits of the above withdrawal, unless reserved for some other purpose, &c.

In the adjustment of this grant entire lists of selections were made, filed, and withdrawn and others substituted in lieu thereof, and in this manner many tracts were noted on the tract books as "selected" which were not included in the approved lists.

The above section 29, 47, 41 W., appears to have been thus selected under act of March 3, 1865, for the benefit of the Portage Lake and Lake Superior Ship Canal Company, but it was not included in the approved lists.

As the grant under the acts of March 3, 1865, and 3rd July, 1866, or the Portage Lake and Lac La Belle Ship Canal Companies have

been fully satisfied and adjusted, the selections in the list marked "A" and enclosed herewith, which was made by the agent of the State but not included in the approved lists in the final adjustment of the grants, have been this day held for cancellation, subject to appeal within sixty days.

Inclosed I also send you a list, marked list "B," comprising such of these lands as are vacant and not shown as reserved,
201 appropriated, or otherwise disposed of on the books of this office. This list you will carefully compare with the records of your office, noting such entries as appear to be in conflict therewith, and promptly notify this office of the same in order that the proper corrections may be made, and if no appeal is taken from this action by the canal company or other parties in interest and it becomes final, proper steps will be taken to restore the same to market, as directed by my letter of December 22, 1874.

This restoration is intended to include all the unappropriated or vacant lands which were not restored by your notice of March 16, 1865, by reason of having been selected for the above ship canal, but it is not intended to include the lands within the limits of the grant from the Ontonagon and State Line railroad, also known as the Ontonagon Branch of the Chicago, St. Paul and Fond du Lac railroad, the title of said lands being in dispute; neither does it include the lands withdrawn from the Marquette, Houghton and Ontonagon railroad, nor the lands patented to Messrs. Spaulding and Whitbeck, under the adjustment made in that case, by which the land company relinquished its rights to the lands sold to said parties and selected others in lieu thereof.

The restoration of the lands approved for the Bay de Noquet and Marquette Railroad Company, but excluded from the grant of said company as readjusted under the act of March 3rd, 1865, is under consideration, and will form the subject of another communication. They are not included in the lists herewith transmitted. Should an appeal be taken, you will promptly forward the same to this office. By prompt action any corrections which may be found necessary can be made in the meantime.

202 Under no circumstances will you permit any entries of any of these lands or take any action further than herein directed in relation thereto until specially instructed by me.

The entries which have already been made upon these lands will be submitted to the board of equitable adjudication for adjustment.

Notify all parties in interest of this action and report promptly at expiration of the time allowed for appeal the action taken.

Respectfully, J. A. WILLIAMSON,
*Commissioner.*

List "A" enclosed in said letter embraced descriptions of land aggregating about one hundred thousand acres, but did not embrace any of the lands involved in these suits.

203 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Aug.* 7, 1879.

Register and receiver, Marquette, Mich.

GENTLEMEN: Yours of the 18th ultimo, stating that certain locations and entries therein specified are in conflict with the revised list "B" of lands held for restoration to market by my letter "F" of 7 March last is received.

Said conflicting entries are shown to have been made June 23, 1879. Attention is invited to my letter "F," above mentioned, wherein you are instructed "under no circumstances to per-
204 mit any entries of any of theso lands or take any action further than herein directed in relation thereto until specially directed by me."

In disregard of the above instructions, you continued to permit entries to be made upon these lands, and now report them as being in conflict with tracts listed and held for restoration by my decision of 7 March last. As I am unable to account for your action in the premises, you will please report at once, in full, the reason for such seeming misconduct.

The appeal taken by J. M. Longyear, as agent of the canal company, from my said decision is informal, as it fails to specify any points of exception to the ruling, and you will advise him that thirty days will be allowed in which to prepare and file a formal appeal, as required by the rules of practice, if he desires to do so. Should no appeal be taken, you will so advise this office in order that the restoration may be proceeded with.

Respectfully, J. M. ARMSTRONG,
*Act'g Commissioner.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 12, 1880.

Register and receiver, Marquette, Mich.

GENTLEMEN: It is observed that you have permitted a number of cash entries of the lands withdrawn from the Ontonagon and State Line railroad and directed to be restored to market by my letter "F" of May 29, 1873, which restoration was suspended by telegram of July 30th, 1873, received at your office, and acknowledged by yours of August 1, 1873.

205 By said letter of said 29th of May, 1873, you were directed to permit no further entries until the date of restoration. Your attention is invited to said letter, and you will promptly report by what authority you have allowed entries upon lands within the limits of the withdrawal made for said railroad. The entries in township 42 N., R. 35 and 36, are not upon tracts specified in the list, descriptive, accompanying said letter; but, as the lands upon the Marquette and State Line railroad only were relinquished and restored, and as the withdrawal was made originally from Ontonagon to the State Line under the grant per act of June 3, 1856,

it is held that no restoration of these lands can be made without further legislation by Congress or such judicial action as shall declare a forfeiture of the grant.

(Signed) C. W. HOLCOMB,
*Act'g Com'r.*

MARQUETTE, MICH., *Nov.* 16, 1880.

Hon. J. A. Williamson, Commissioner.

DEAR SIR: Referring to your letter "F," under date 12th ult., I will state that I am unable to find any authority for allowing entries of land within the limits of the withdrawal made for the Ontonagon and State Line railroad. It has been the intention of this office to conform to the instructions contained in your letter "F," and under date of May 29, 1873. The cash entries made upon the lands were inadvertently allowed.

Very respectfully yours, H. H. STAFFORD,
*Register.*

206 Defendants' counsel also offered in evidence a statement, compiled from the records of the United States land office, of lands entered by various parties from June 4th, 1856, to November 1st, 1880, within the six-mile limits of the Ontonagon and State Line railroad, in odd-numbered sections, amounting to 46,130 acres, including land certified to the State May 19th, 1871, to aid in the construction of the Portage Lake and Lake Superior Ship Canal.

Defendants' counsel also introduced in evidence a letter of the Commissioner of the General Land Office, addressed to the Secretary of the Interior, dated January 5th, 1881, of which the following is a copy, including in said letter a letter from Joseph S. Wilson to P. J. Avery, dated October 6th, 1869:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 5, 1881.

Hon. Carl Schurz, Secretary of the Interior.

SIR: I am in receipt of letter of 24th December last from Hon. George L. Converse, chairman of the House Public Lands Committee, addressed to you and referred to this office, inclosing copy of a bill (H. R. No. 6525) "to declare certain lands granted to the State of Michigan to aid in the construction of railroads forfeited to the United States, and for other purposes."

The bill is as follows:

"Be it enated by the Senate and House of Representatives of the United States of America in Congress assembled, That such of the lands granted to the State of Michigan by act of Congress approved June third, eighteen hundred and fifty-six, entitled 'An act
207 making a grant of alternate sections of the public lands to the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes,' as were disposed of by act of the Legislature of the State of Michigan approved Feb-

ruary fourteenth, eighteen hundred and fifty-seven, to the Ontonagon and State Line Railroad Company to aid in the construction of a railroad from Ontonagon to the Wisconsin State line, excepting such portion thereof as has since been granted to the Marquette and Ontonagon Railroad Company, which said grant has expired and lapsed by limitation, are hereby declared forfeited to the United States, and the said lands shall hereafter be disposed of as other public lands of the United States:

"Provided, That the rights of all parties holding patents or who have located supreme court or other scrip or made homestead entries and settlement or pre-emption claims of and upon said lands in conformity with the laws of the United States relating to the sale and settlement of the public lands shall be confirmed and protected in the same manner as though no reservation of said lands had ever been made."

Mr. Converse requests you to furnish the committee with your opinion as to the propriety of the passage of said bill and any facts you may have bearing on the subject.

The lands in question were reserved by telegram of May 30, 1856, in advance of the passage of the act of 3rd June, 1856, granting lands to the State of Michigan in aid of the construction of certain railroads, the above railroad from Ontonagon to the Wisconsin State line being one of the roads specified in said act.

The lands were withdrawn by public notice No. 561, of June 13, 1856.

208 The grant was accepted by the State and conferred upon the said railroad company by the act of State Legislature approved Feb. 14, 1857.

The Ontonagon and State Line R. R. Co. did nothing toward constructing the road, and on March 27, 1857, it was consolidated with the Chicago, St. Paul and Fond du Lac Railroad Company, which latter company had previously been consolidated with the Marquette and State Line Railroad Company, and also with the Wisconsin and Superior Railroad Company of Wisconsin.

The Chicago, St. Paul and Fond du Lac Railroad Company surveyed and located its line of route and the branches from the Wisconsin State line at Brule river to Marquette and Ontonagon respectively, and on November 27, 1867, transmitted maps of the same to this office.

The line from Ontonagon to the Wisconsin State line was accepted December 3rd, 1857, by letter from this office to P. H. Smith, Esq.

The line from Marquette to the State line was accepted April 7, 1858.

It appears from correspondence on file in this office that the Chicago, St. Paul and Fond du Lac Railroad Company became insolvent and the Chicago and Northwestern Railway Company succeeded to the grant as assignee of the State of Wisconsin.

The Chicago and Northwestern Railroad Company was permitted by joint resolution of April 25, 1862 (12 Stat., 618), to relocate its line of route from Appleton, in Wisconsin, northwardly to the State

line near the mouth of the Menominee river, taking its lands, however, along its original line as located.

April 20, 1860, the lands in the Upper Peninsula of Michigan, outside of the six-mile limits of the several railroads, were restored to market.

209 March 4, 1861, the Legislature of the State of Michigan authorized the board of control to transfer the grant made to the State in aid of the construction of a railroad from Marquette to the Wisconsin State line and to relocate the same.

April 24, 1861, said board of control declared said land grant forfeited to the State and conferred the same upon the Peninsula Railroad Company and requested Congress to confirm said action.

July 5, 1862, Congress, by joint resolution (12 Stat., 620), authorized such change of location and confirmed the grant along the new line of route, viz., from Marquette to the mouth of the Menominee river, on condition that the said railroad Co. and the State should relinquish the lands along the abandoned line from Marquette to Wisconsin State line

March 18, 1863, the action of the board of control was confirmed by the Legislature of the State of Michigan.

May 6, 1863, the Peninsula Railroad Company relinquished the lands along the abandoned line.

October 21, 1864, the Peninsula Railroad Company was consolidated with the Chicago and Northwestern Railway Company.

January 1, 1868, the Chicago and Northwestern Railway Company relinquished the lands along the abandoned line, including those approved in common with the Ontonagon and State Line railroad, and also lands certified in common to the Ontonagon and State Line branch and the Marquette and Ontonagon Railroad Company to the State, and on May 2, 1868, the Governor of Michigan relinquished the same to the United States.

The last list of lands above specified was undoubtedly included in said relinquishment through inadvertence.

210 July 13, 1868, the Commissioner of the General Land Office demanded deeds of relinquishment from the Chicago and Northwestern Railway Company and the State of Michigan for the lands along the Ontonagon and State Line railroad also as a condition precedent to the approval of the selections made by the Chicago and Northwestern Railway Company along its line as relocated from Marquette to the mouth of the Menominee river, which demand was acceded to by the said parties, and on October 8, 1870, the required deeds relinquishing the lands along the Ontonagon and State Line railroad were filed and accepted by this office.

From the above it appears that this office considered and treated the lands along both branches of the line of the Chicago, St. Paul dan Fond du Lac railroad as embraced in the transfer to the Chicago and Northwestern Railway Company, and the views of this office at that time are set forth in the following letter, under date of October 6, 1869, addressed to Hon. P. J. Avery, president of the Portage Lake and Lake Superior Ship Canal Company, viz:

"SIR: I have had the honor to receive your letters of the 29th ult., addressed to the Hon. J. M. Edmunds, desiring to know the status of the lands originally granted to the State of Michigan for the Chicago, St. Paul and Fond du Lac railroad. In answer I have to state it appears that on the 5th of June, 1868, you filed a preliminary list of selections for the Portage Lake and Lake Superior Ship Canal Company, embracing 50,072.57 acres, as land formerly certified to the State of Michigan under act of June 3, 1856, for said railroad branch, which line has been abandoned. It is further shown that on the 9th of July, 1868, a release was filed by said State and railroad company descriptive of the tracts along the branch line to Marquette, which covers the tracts embraced in your
211 preliminary list. In regard to your impression that the release is defective, I have to say it is complete and meets the requirements of this office. It will be necessary to have the selections in said list verified by the register and receiver at Marquette and the fees required by law paid thereon and upon their being returned to this office for examination, if found correct they will be submitted for approval.

The tracts in town. 44 N., R. 34 W., making 357.87 acres referred to in your letter of 12th July last as being suspended in your list of selections, requires a release from the State authorities as land certified to the State for the abandoned branch line which was to run from the State line to Ontonagon, and for that purpose I transmit herewith a form of release used.

Very respectfully,

JOS. S. WILSON,
*Commissioner.*"

Upon receipt of the required release the above, with other selections made by the agent of the State of Michigan under the grant made per act of July 3, 1866, in aid of the construction of the Portage Lake and Lake Superior ship canal, were submitted for approval.

May 22, 1871, a list of lands embracing about 15,000 acres of the lands within the limits of the grant under consideration and inuring thereto was approved to the State for said ship canal, and other parcels were disposed of as they were considered and treated as public lands, and those which had been certified to the State for said branch to Ontonagon were directed to be restored to market.

July 10, 1873, Governor Bagley, of Michigan, requested a
212 suspension of said restoration, and the order therefor was suspended by telegram of July 30, 1873.

By act of 3rd June, 1856, a grant was also made to the State of Michigan in aid of the construction of a railroad from Marquette to Ontonagon, which grant had been revived and extended by acts of March 3, 1865 (13 Stat., 521), and April 20, 1871 (17 Stat., 643), and on April 28, 1865, a withdrawal of the lands along the line as located, embracing indemnity limits of 20 miles upon each side, was ordered by this office, which order was continued by letter "F" of

7th May, 1871, in favor of the Houghton and Ontonagon Railroad Company as successor to the Marquette and Ontonagon R. R. Co.

Said withdrawal includes a portion of the lands originally withdrawn from the Ontonagon and State Line railroad.

In my report of 11th March, 1878, addressed to you (see H. R. Ex. Doc. 77, 45 Congress, 2d session), the status of these lands is fully set forth, and I recommended action looking towards a forfeiture of the grant and a restoration of the lands to market.

Since said report was submitted, however, I have been advised by letter of 4th November last from Benton Hanchett, Esq., addressed to you and referred to this office on 10th November last, of the action of the board of control of the State of Michigan, and on the 11th of September last, declaring the grant under consideration forfeited to the State, and conferring the same upon the Ontonagon and Brule River Railroad Company, a corporation duly organized for the purpose of constructing a railroad upon said line of route as originally located by the Chicago, St. Paul and Fond du Lac Railroad Company from Ontonagon to the State line, which action would be defeated by the passage of the bill under consideration.

213 Copies of the articles of incorporation of said railroad company and of the resolution of said board of control relative thereto are herewith submitted.

It appears that the action of my predecessor in demanding and accepting, as well as that of the railroad company and the Governor in executing, the relinquishment of the lands along the line of the grant in question was unauthorized, and that the title thereto remains in the State, there having been no declaration of forfeiture.

As the State, by its board of control, has now taken steps to resume and confer the grant upon another company which proposes to build a road on the line for which the original grant was made, I am not prepared to recommend the passage of the bill as submitted, and which provides for the forfeiture of the entire grant.

Inasmuch, however, as the complications concerning the grant have arisen in a great measure from the failure of the several grantees of the State to comply with the terms of the granting act by the actual construction of a road, I am of the opinion that in any legislation by Congress looking to the further recognition of the grant the rights of all actual settlers and of others who have been permitted to make entries in good faith under the general laws, as well as a party holding under a certification of lands of the State for the benefit of the canal company, should be in some manner protected.

Mr. Converse's letter and a copy of the bill are herewith returned.

Very respectfully,

(Signed) J. A. WILLIAMSON,
*Commissioner.*

Also a letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated October 20th, 1881, of which the following is a copy:

214 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 20, 1881.

Hon. S. J. Kirkwood, Secretary of the Interior.

SIR: I have the honor to acknowledge the receipt, by reference from the Department, of a letter addressed to you, under date of the 23rd July last, by the Governor of Michigan, transmitting a copy of a letter received by him from Mr. Ezra Rust, president of the Ontonagon and Brule River Railroad Company, requesting him to ask you to direct a withdrawal of lands within the indemnity limits of the original grant to the State of Michigan for a railroad from Ontonagon, in said State, to the Wisconsin State line.

The Governor requests that action be taken as indicated by Mr. Rust.

The grant in question was made by act of Congress, approved June 3, 1856 (11 Stat., p. 21), "to aid in the construction of railroads from Little Bay de Noquet to Marquette and thence to Ontonagon, and from the two last-named places to the Wisconsin State line."

The Ontonagon and State Line Railroad Company was organized August 20, 1856, and on February 14, 1857, the Legislature of Michigan conferred upon said company the grant designed to aid in the construction of the road between Ontonagon and the Wisconsin State line. This company filed no map and made no survey, nor did it construct or attempt to construct any portion of the road.

On March 27, 1857, the Ontonagon and State Line Railroad Company was consolidated with the Chicago, St. Paul and Fond du Lac Railroad Company, with which the Marquette and State Line Company had been previously merged.

215 The map of definite location of the Ontonagon and State Line Branch of said consolidated line was filed by the Chicago, St. Paul and Fond du Lac Railroad Company in the General Land Office November 27, 1857, and approved by the Commissioner December 3, 1857.

Said company, however, failed to construct any portion of the road, but became insolvent, and its franchises and rights were sold under foreclosure proceedings June 2, 1859. On June 6, 1859, a new company was formed under the name of the Chicago and Northwestern Railway Company.

No portion of the road from Ontonagon to the Wisconsin State line was ever constructed by the Chicago and Northwestern Railway Company nor by any other corporation.

On September 8, 1880, still another company was formed under the name of the Ontonagon and Brule River Railroad Company.

On June 7, 1881, the Legislature of Michigan, confirming the action of the State board of control had in the premises on September 8, 1880, declared the grant to the Ontonagon and State Line Railroad Company forfeited to the State, and conferred the same upon the Ontonagon and Brule River Railroad Company.

The original grant by Congress was limited to ten years from the date thereof, expiring June 3, 1866. Twenty-five years have there-

fore elapsed since the date of the grant and fifteen years since its expiration by limitation, and no portion of the road had been constructed on June 7, 1881, when the act of the Legislature above referred to was passed.

On May 30, 1856, prior to the passage of the granting act, the Commissioner of the General Land Office, by telegram to the local land officers, withdrew from sale and location all lands within the presumed limits of the anticipated grant to the State for railroads in the Upper Peninsula.

216 On June 13, 1856, by public notice No. 561 the reservation previously made by telegraphic order was continued.

This withdrawal embraced all the public lands in the Upper Peninsula north of township 39 north and west of range 19 west.

On April 10, 1860, by public notice No. 658 all vacant lands outside of the six-mile limits of the original grant in aid of the construction of railroads "from Little Bay de Noquet to Marquette and thence to Ontonagon, and from the two last-named places to the Wisconsin State line," were directed to be restored to market on June 18, 1860.

On April 27, 1860, the local land officers were informed by letter from this office that "as all the vacant lands in the odd-numbered sections outside of the six and within the fifteen mile limits have been selected by the agent of the State in lieu of the lands disposed of in the sections granted by the above-mentioned act, said tracts are not restored to market by notice 658, and you will, of course, continue to reserve them from sale or location as heretofore for any purpose whatever."

It does not appear as a matter of fact that any selection of lieu or indemnity lands had been made within the limits specified. Literally, therefore, there was no "selected" lands upon which the Commissioner's instructions of April 27, 1860, could operate as a revocation of the order of withdrawal made by public notice No. 658.

And it appears that the vacant lands within the township originally withdrawn for railroad purposes outside of the six-mile limits of the grant of 1856 were in fact thereafter treated and disposed of as public lands. The tract-books of this office show the following notes under the head of the respective townships:

"Lands not selected for railroad restored June 18, 1860."

217 On December 12, 1861, all the vacant lands within the six-mile limits of the lines of projected road from Marquette and Ontonagon to the Wisconsin State line were certified to the State for the benefit of the Chicago and Fond du Lac Railroad Company, although no portion of either of these roads or branches had been constructed or commenced.

On July 5, 1862, Congress, by joint resolution (12 Stat., 620), authorized a change of location of the line of road from Marquette to the Wisconsin State line. The joint resolution provided for an equivalent grant to the State of lands along the new line to the extent of the original grant of six sections per mile "upon the filing in the General Land Office of the lists of said railroad lands, in

whole or in part, as now selected and certified in the General Land Office, with a certificate of the Governor of the State of Michigan, under the seal of the State, that the State and its assignees surrender all claim to the lands as aforesaid set forth and described in the lists thereof thus certified, and that the same have never been pledged or sold or in anywise incumbered."

The act also provided for the reoffering at public sale of the lands embraced in the lists of surrendered lands filed in the General Land Office, as directed by the act.

The certified lands along the line of the previous location for a road from Marquette to the Wisconsin State line were relinquished to the State by the Chicago and Northwestern Railroad Company, successor to the Chicago, St. Paul and Fond du Lac Railroad Company, on January 1, 1868, and said lands were relinquished by the State to the United States May 2, 1868.

It appears to have been the opinion of this office that the joint resolution of July 5, 1862, operated as a vacation of the
218 original grant as an entirety, and required the surrender of all lands certified thereunder before the grant for the amended line from Marquette to the Wisconsin State line could become effective.

Accordingly, on July 13, 1868, the Commissioner called for a relinquishment of the certified lands on the line from Ontonagon to the Wisconsin State line. The necessary deeds were duly executed by the Chicago and Northwestern Railroad Company to the State of Michigan and by the Governor of Michigan to the United States, and filed in this office and accepted October 8, 1870. Thereupon the adjustment of the new grant for the line from Marquette to the Wisconsin State line was proceeded with.

On May 29, 1873, the released lands along the line from Ontonagon to the Wisconsin State line were ordered to be offered at public sale on August 6th, 1873, as directed by the fifth section of the joint resolution of 1862 for lands restored under that act. This order was suspended on July 30, 1873, and has not since been executed.

The validity of the relinquishment of the previously certified lands along the line from Ontonagon to the Wisconsin State line has been brought in question, it having been alleged that the Governor had no lawful authority to execute the relinquishment called for by the Commissioner of the General Land Office under the construction given by the latter officer to the joint resolution of 1862.

By the act of March 3 1863, (12 Stat., 797), a grant of public lands was made for the construction of a military wagon-road in the Upper Peninsula from Copper Harbor to the Wisconsin State line.

The time for the completion of this road was extended by subsequent acts to January 1, 1874. During this period, and afterwards in the final adjustment of the wagon-road grant, lands
219 within the original and indemnity limits of the grant for the railroad from Ontonagon to the Wisconsin State line were certified to the State for the benefit of the wagon road.

On March 3, 1865 (13 Stat., 518), Congress granted to the State of

Michigan, for the construction of the Lake Superior and Portage Lake ship canal, two hundred thousand acres of public land, to be selected in the Upper Peninsula in the manner prescribed by the statutes. This grant was increased 200,000 acres more by the act of July 3, 1866 (14 Stat., 81). On the same date one hundred thousand acres of public lands in the Upper Peninsula were granted to the State for the benefit of the Lac la Belle Harbor Improvement Company.

Withdrawals of public lands embracing lands within the limits of the original grant for a railroad from Ontonagon to the Wisconsin State line were made for the benefit of the ship canals.

On April 24, 1868, the vacant lands remaining after the ship-canal selections *have* been made were ordered to be restored to market by public notice No. 727, and the tract books of this office show such restoration as having been made June 15, 1868.

The grant for ship-canal purposes having been finally satisfied, and there being a larger remainder of lands that had been selected but not needed nor certified under these grants, such lands were restored on April 16, 1880, in accordance with the instructions of the Secretary of the Interior of January 2, 1880.

I am now called upon to consider the question of recommending a rewithdrawal for the benefit of the Ontonagon and Brule River Railroad Company of public lands within the original indemnity limits of the grant for a road from Ontonagon to the Wisconsin State line, which have been restored to market, as hereinbefore recited.

220 The time limited by law during which the grant of lands made in 1856 in aid of the construction of this road was available to the State of Michigan expired in 1866.

The grant has not been renewed by Congress. The road has not been constructed. The grant has been deemed abandoned for many years. Lands within the indemnity limits which were originally withdrawn for the benefit of the grant have been restored to entry by the same authority by which they were withdrawn.

The act of 1856 contained no provision for a withdrawal of an indemnity of lands for the benefit of this grant. But even if the withdrawals that were made when the act was operative were valid it could not be assumed that such validity would extend to withdrawals made after the expiration of the grant.

It is within the perfect power of Congress to revive and renew this grant and to recognize and confirm the act of the Legislature of Michigan in conferring or attempting to confer the same upon the Ontonagon and Brule River Railroad Company or to settle all disputed questions of title and all other questions relative to the grant by a declaration of forfeiture.

During the last session of Congress a bill formally declaring the grant forfeited was submitted to this office by the proper committee for report thereon, and such report was duly made and transmitted through the Department on January 5, 1881.

I should deem it unwise, as well as improper, to take any action that might be construed as an executive extension of a grant which

Congress can only revive, or that might appear to be an attempt to forestall the action of Congress by a withdrawal at the present time of public lands within the original indemnity limits of the unconstructed road.

221 I have reviewed the history of this grant in order that the principal facts in the case may be brought before you.

I arrive at the conclusion therefrom that I have no lawful authority to recommend the withdrawal asked for.

The Governor's letter, with its inclosure, is herewith returned.

Very respectfully, your ob't serv't,

N. C. McFARLAND,
*Commissioner.*

Also a letter from the Commissioner of the General Land Office to the Honorable J. G. Sutherland, dated May 23, 1872, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *May* 23, 1872.

Hon. J. G. Sutherland, House of Rep's.

SIR: In reply to yours of the 21st instant I have the honor to state that the joint resolution of the 5th July, 1862, authorized a change in the line of road from Marquette to the Wisconsin State line in Michigan so as to run from Marquette to Menominee, and directed in the 5th section that when the State should relinquish the land certified on the original line there should be certified a like amount on the new line.

This line of road was held by the Chicago and Northwestern Railroad Company, who also held a line from Ontonagon to the Wisconsin State line, and for which lands had been certified to the State.

In the surrender of lands it appears that my predecessor
222 required a relinquishment also of the lands certified for this road, although the joint resolution allows no change in that line, nor does it make any mention of the same in any manner. The question of the surrender of these lands does not appear to have been a matter of agreement with this office, and the reason for the action of my predecessor in the case is not shown in any of the correspondence, and I do not think that such resolution required such relinquishment.

Very respectfully, WILLIS DRUMMOND,
*Commissioner.*

Also the report of the Committee on Public Lands to the Senate or the United States, dated January 20th, 1881, of which the following is a copy:

IN THE SENATE OF THE UNITED STATES.

January 28, 1881.—Ordered to be printed.

Mr. Walker, from the Committee on Public Lands, submitted the following report (to accompany bill S. 1997):

The Committee on Public Lands, to whom was referred the bill (S. 1997) to quiet the title to certain lands in the Upper Peninsula of Michigan, and also the bill (S. 2026) to affirm to the State of Michigan certain lands heretofore granted to said State to aid in the construction of a railroad, and for other purposes, submit the following report:

By the act of Congress approved June 3, 1856 (11 U. S. Stat., p. 21), there was granted to the State of Michigan to aid in the construction of certain railroads in that State every alternate
223 section of the public lands, designated by odd numbers, for six sections in width on each side of said roads; and it was provided that if at the time when the routes of any of said railroads should be definitely fixed the right of pre-emption should have attatched to any of such lands, then it should be lawful for the State to select other lands in the place of such so pre-empted within the limits of fifteen miles of such roads, and authority was given the State to sell or dispose of said lands in the manner in said act provided.

It was also provided by said act that if any of said roads should not be completed within ten years no further sales of said lands should be made, and the lands unsold should revert to the United States.

Among said railroads was one from the village of Ontonagon, on Lake Superior, to the Wisconsin State line, and another from Marquette to said State line.

By act of Legislature of Michigan approved February 14, 1857 (Laws of Mich., 1857, No. 126, p. 346), said State conferred the lands granted in aid of the first-named road (from Ontonagon to the State line) upon the Ontonagon and State Line Railroad Company upon certain conditions in said act set forth, both said companies being corporations organized under the laws of said State.

These two corporations, before any act was done toward the construction of either of said railroads (viz., in March, 1857), by agreement, under the laws of Michigan, consolidated with the Chicago, St. Paul and Fond du Lac Railroad Company under the name of the latter, and that consolidated company then became vested with all the lands and franchises of the former corporations, and in December of the same year filed in the General Land Office maps of the location of railroads from Ontonanon to the Wisconsin
224 State line and from Marquette to the Wisconsin State line, the terminus of both at the State line being at the same point.

This consolidated corporation (the Chicago, St. Paul and Fond du Lac Railroad Company) became insolvent, and all its franchises and property were sold under mortgage sale or foreclosure in June,

1859, and the purchasers formed a new corporation under the name of the Chicago Northwestern Railway Company.

By authority of an act of the Legislature of Michigan approved March 4, 1861 (Laws of Mich. of 1861, No. 90, p. 123), the board of control of said State were authorized to confer the lands granted in aid of said railroads from Marquette to the State line "upon some other competent party or company under the general regulations and restrictions of said act of February 14, 1857," and on the 24th of April, 1862, said board of control conferred the same upon the Peninsula Railroad Company, and that transfer was approved by joint resolution of the Legislature of Michigan approved March 11, 1863 (Mich. Laws, 1863, No. 127, p. 186).

By joint resolution of Congress, approved July 5, 1862, the route of the railroads from Marquette to the Wisconsin State line established by the map filed in 1857, as above stated, was authorized to be changed so that it should touch at favorable points on Green Bay and its terminus at the Wisconsin State line should be near the mouth of the Menominee river; and it was provided—

That upon filing in the General Land Office of the lists of said railroad lands, in whole or in part, as now selected and certified in the General Land Office, with the certificate of the Governor of the State of Michigan, under seal of the State, that said State and its assigns surrender all claim to the land as aforesaid set forth and described in the lists thereof thus certified, and that the same have never been pledged or sold or in anywise incumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of land selected in like manner upon the new line of road as thus surrendered upon the first line and to the extent of six sections per mile in the aggregate for every mile of the new line according to the general provisions of the act of June third, eighteen hundred and fifty-six; and it shall be the duty of the Commissioner of the General Land Office to re-offer for public sale in the usual manner the lands embraced in the lists of surrendered lands aforesaid when duly filed in this office as herein directed.

In October, 1864, the Peninsula Railroad Company was consolidated with the Chicago and Northwestern Railroad Company under the laws of Michigan, and all the franchises and property of the Peninsula Railroad Company became vested in the consolidated corporation (the Chicago and Northwestern Railroad Company).

On the 31st of January, 1868, the last-named company, by deed, released to the State of Michigan all the lands which had been certified by the Commissioner of the General Land Office of the State in aid of the construction of the railroads from Marquette to the Wisconsin State line on the original line of said road, and including lands at and near the junction or common terminus of the route of the Ontonagon and State Line and the original line of the Marquette and State Line roads which were held in common for these wo roads, and also including lands at and near the junction and erminus at Ontonagon of the route of the Ontonagon and State

Line road and the route of another road provided for in said act of Congress from Marquette to Ontonagon.

226 On the 1st day of May, 1868, the Governor of Michigan executed his certificate, under seal of said State, certifying that "said State of Michigan and its assigns had, and hereby did, surrender and release to the United States of America all right and title, interest and claim, in the premises hereinafter particularly described, and that the same had never been pledged, sold, or otherwise incumbered." To this certificate was appended a list of lands, being the same described in the release of the Chicago and Northwestern Railroad Company in the State above mentioned.

This certificate and lists appended were duly filed in the General Land Office July, 1868.

No part of the railway from Ontonagon to the Wisconsin State line having been constructed, and the limit of ten years fixed by said act of Congress for its construction having expired, the Commissioner of the General Land Office, by letter dated July 18, 1868, addressed to the solicitor of the Chicago and Northwestern Railway Company (the successors of the Ontonagon and State Line Railroad Company, as above stated), acknowledging the receipt of the above-named release, called attention to the "list of lands embracing 142,430.27 acres certified to the State December 12, 1861, for the branch line to Ontonagon," and requested the State and railroad company to execute a similar release of said lands.

On the 17th of June, 1870, the Chicago and Northwestern Railway Company executed a deed of release to the State of Michigan of the residue of the land granted to aid the construction of the railway from Ontonagon to the Wisconsin State line, and on the 14th day of August, 1870, the Governor of said State, acting under the written opinion of the attorney general of the State, executed his certificate, under the seal of the State, certifying that the

227 State of Michigan and its assigns had, and did thereby, surrender and release to the United States of America all right, title, interest, and claim to the premises hereinafter particularly described, and that the same has never been pledged, sold, or otherwise incumbered. Thereto there was appended a list describing all the residue of the lands which had been certified to the State to aid in the construction of a railroad from Ontonagon to the Wisconsin State line not embraced in the previous release above mentioned of the Governor of Michigan.

This certificate of release and list appended were duly filed in the General Land Office.

The lands embraced in the two releases above named by the Governor of Michigan amounted to 340,143.60 acres.

After the receipts of the above-named lists and releases the Commissioner of the General Land Office certified to the State of Michigan 390,451.89 acres of land upon the new line from Marquette to the mouth of the Menominee river, established under authority of said resolution of Congress of July 5, 1862, being an excess of 50,298.29 acres over the quantity of lands released by both said certificates of release by the Governors of said State.

The committee have no satisfactory explanation of this action of the Commissioner of the General Land Office. It is deemed probable that it was through misconstruction of the resolution of Congress of July 5, 1862, or other mistake.

By letter addressed to the Secretary of the Interior, dated July 10, 1873, the then Governor of Michigan claimed that the surrender by his predecessor of the lands granted by the act of Congress of June 3, 1866, in aid of the construction of a railroad from Ontonagon to the Wisconsin State line was without authority and that such lands still belonged to said State.

228 It may be that the Governor of Michigan had strictly no legal authority to make the release above mentioned of the lands along the line of the proposed railroad from Ontonagon to the State line; but after that release the General Land Office appears (and, as it seems to the committee, with good reason) to have considered and treated these lands (as well as those on the original line of the Marquette and State Line railroad) as having been fully revested in the United States and to have disposed of about 29,931 acres of them to parties who in good faith, and with good reason to believe the titles thus acquired to be perfect, purchased the same or made homestead entries, settlements, or pre-emption claims thereon or selected them under other grants of the United States in aid of public works.

It appears to the committee that justice to these parties requires that their title so acquired should be confirmed and protected to the extent they would be if said grant to the State of Michigan had not been made, and that this may be done without any injustice to or just cause of complaint by the State of Michigan or any other party.

Nearly twenty-five years have elapsed since the grant of the lands to Michigan, and no part of the railroad from Ontonagon to the Wisconsin State line, to aid which these lands were granted, has been constructed, and therefore for nearly fifteen years these lands, by the express provisions of the act of Congress granting them, have been liable to forfeiture to the United States. Whatever right the State of Michigan may now have in them (if any) is only a naked legal estate, merely by the forbearance of Congress to declare a forfeiture, and is without any equities whatever, and the State has in fact received by way of exchange for these lands in the man-

229 ner above stated a greater quantity of other lands of equal or greater value.

The United States has received payment for these lands from the parties whose titles are recommended to be confirmed. The Government, therefore, looses nothing by such disposition of the lands.

On the 17th of September, 1880, the board of control of the State of Michigan undertook, by resolution, "to confer upon the Ontonagon and Brule River Railroad Company (a corporation organized in the same month) all and every right, title, and interest which then remained in the State of Michigan to said lands, be the same more or less."

It appears to the committee that this action of the board of control was without authority of the State, but whether that be so or

not it was in violation of the express provision of the act of Congress of June 3, 1856, which prohibited the disposition of any of these lands after the expiration of ten years, unless the railroad for which they were granted was then completed, and in accordance with the decision of the Supreme Court of the United States (in Schulenberg *vs.* Harriman, 21 Wall. R., 44,) was void. The corporation had full knowledge of the facts above stated. It has paid no consideration for the lands and done nothing to earn them. It has, therefore, neither legal or equitable title therein.

No other party appears to have or claim any title to any of these lands.

Though it appears that no injustice would be done by a declaration of forfeiture and the resumption of the residue of these lands by the United States, yet, in view of the public benefit which may be derived from the construction of the railroad in aid of which these lands were originally granted and the impossibility
230 that without some aid from the United States such road will be constructed, the committee recommend that the residue of these lands remaining after confirmation of the titles above recommended be confirmed to the State of Michigan, to be disposed of only in aid of the construction of such railroad in accordance with said act of Congress of June 3, 1856. This residue comprises about one hundred and thirty-seven acres (within the limits of six miles of the route of said road), and it may reasonably be expected that it will prove a sufficient inducement for the construction of such road. This view is confirmed by the application of a responsible railroad corporation (the Milwaukee, Lake Shore and Western Railway Company), which seeks a grant of said residue, and appeared before the committee to advocate the second bill above named (S. 2026) and presented a resolution of its board of directors to the effect that it would construct said road provided it could procure a grant of said residue of said lands.

The committee, however, do not deem it expedient that Congress should designate the particular corporation or parties who may construct said road, or to whose benefit such residue shall inure, but consider that this power may more properly be conferred upon the State of Michigan.

The committee therefore report the first-named bill with amendments, and recommend that the same as amended be passed.

Also a letter from the Governor of the State of Michigan to the Secretary of the Interior, dated July 10, 1873, of which the following is a copy:

STATE OF MICHIGAN,
EXECUTIVE OFFICE, DETROIT, *July* 10, 1873.

DEAR SIR: It appears from the inclosed notice that the
231 lands granted to the State of Michigan by the act of Congress approved June 3, 1856, to aid in the construction of a railroad from Ontonagon, Michigan, to the Wisconsin State line are to be offered for sale. These lands rightfully belong to the State of Michigan, Congress never having passed any act annulling the

grant, and the Legislature of Michigan never having authorized their surrender.

My predecessor, Governor Baldwin, in 1868, surrendered these lands contrary, in his opinion, to law, in deference to the demands of the Commissioner of the General Land Office. This surrender was claimed by the General Land Office under the act of Congress of July 5, 1862, but by referring to this act it will be seen that the branch road from Ontonagon to the Wisconsin State line is not mentioned, the branch from Marquette to the Wisconsin State line being the only one named or intended; would respectfully refer you to the correspondence had with the Chicago and Northwestern Railroad Company on this subject.

The Chicago, St. Paul and Fond du Lac Railroad Company, now the Chicago and Northwestern Railrord Company, was the grantee of the State for both the Marquette and Ontonagon Branches of the Chicago, St. Paul and Fond du Lac road, and hence the confusion that seems to have arisen.

The Department declined to recognize the claim of the Chicago and Northwestern Railroad Company on the new line, unless the Governor of Michigan would first surrender the lands on the Ontonagon Branch, as well as those on the Marquette Branch. The Governor consequently did surrender them, as required by the Department, in order to protect the Chicago and Northwestern Railroad Company.

The surrender of these lands was without any authority given by the Legislature of this State, and has no warrant under any
232 acts of Congress or the decision of the courts as applied to lands in like circumstances. Therefore I most respectfully request you to have the lands in question withheld from sale.

Yours, very truly,

JOHN J. BAGLEY, *Governor.*

Hon. Columbus Delano.

Defendants' counsel further introduced in evidence the record of certain action taken by the board of control of railroad grants in the State of Michigan, of which the following is a copy:

DETROIT, *April* 16, 1862.

A meeting of the board of control of railroad grants for the State of Michigan convened this day, at two o'clock p. m., at the Michigan Exchange, upon the call of Gov. Blair.

Present: Hon. Omar D. Conger, Hon. Perley Bills, Hon. Hovey K. Clarke, Hon. Chas. Tripp, Hon. W. D. Foster.

The Governor being absent, the Hon. Omar D. Conger was called to the chair.

The object of the meeting was stated to be to hear the application of the Peninsula Railroad Company for the grant of lands which this board is authorized to confer by act No. 90, approved March 4, 1861, of the session laws of that year.

Charles T. Harvey, Esq., one of the directors of said company, was present, and after conference with the board the meeting was, at

his request, adjourned to meet in the same place on the 24th of April, at 2 o'clock p. m., of which adjournment the secretary was requested to give notice to the Governor and Honorable H. M. Peck, one of the members of the board.

233 DETROIT, *April* 24, 1862.

The board convened this day at the Michigan Exchange, at 2 o'clock p. m., in pursuance to the last adjournment.

Present: Hon. Omar D. Conger, Hon. Chas. Tripp, Hon. Horace M. Peck, Hon. Perley Bills, Hon. William D. Foster, Hon. Hovey K. Clarke.

Mr. Conger in the chair.

Thos. W. Lockwood, Esq., appeared on behalf of the Peninsula Railroad Company and presented a petition in the words following—that is to say:

To the board of control of land grants to railroad companies of the State of Michigan:

The Peninsula Railroad Company, a corporation duly organized under the laws of the State of Michigan for the construction of a railroad from Marquette, in the Upper Peninsula of Michigan, to the Wisconsin State line, near the mouth of the Menominee river, respectfully state that they are advised that the grant of lands heretofore made to the Marquette and State Line Railroad Company by an act of the Legislature of the State of Michigan and entitled "An act disposing of certain grants of land made to the State of Michigan for railroad purposes by act of Congress approved June 3, 1856," which act was approved February 14th, 1857, has become forfeited, with all the rights, franchises, powers, and privileges appertaining thereto, in pursuance of the act of Congress aforesaid and the acts of the Legislature of the State of Michigan aforesaid, and that the power has become vested in your honorable body by virtue of act of the Legislature of the State of Michigan, approved March 4, 1861,

234 entitled "An act authorizing the transfer by the board of control of a grant of lands made to this State by an act of Congress passed June 3, 1856, to aid in the construction of a railroad from Marquette, on Lake Superior, to the Wisconsin State line and the relocation of the same," to confer said lands, franchises, rights, powers, and privileges upon some other company under the general regulations and restrictions of the act of February 14, 1857, before referred to.

Your petitioners further state that their said company has been recently organized for the express purpose of constructing the road aforesaid, and accomplishing the same objects as they conceive in a better mode than those contemplated by the Marquette State Line Railroad Company, provided the aid of the grant of land aforesaid can now be obtained for that purpose, but without which your petitioners would have no encouragement to proceed.

Your petitioners claim and state that they are a competent party under said act to receive said grant, franchises, rights, powers, and privileges and to construct said road, and that they intend to do so

in good faith if said grant is conferred upon them, and that they have the ability to carry out these intentions unless unforeseen obstacles should prevent.

Your petitioners further state that this application is made with the entire concurrence and good will of the Chicago and Northwestern Railway Company, who are the legal successors of the Chicago, St. Paul and Fond du Lac Railroad Company, with which the Marquette and State Line Railroad Company was formerly consolidated.

Your petitioners therefore pray that your honorable board will grant to and confer upon them the lands, franchises, rights, powers, and privileges aforesaid, under and by virtue of said act of
235 March 4, 1861, before referred to, and in accordance with the terms and privileges thereof.

(Signed) P. H. SMITH, *President.*

STATE OF ILLINOIS, } ss:
*County of Cook,* }

Perry H. Smith, president of the Peninsula Railroad Company, being duly sworn, says that he has read the foregoing petition of the said railroad company, by him subscribed, and that the same is in substance and matter of fact true, as he verily believes.

(Signed) P. H. SMITH.

Subscribed and sworn to before me at Chicago, Illinois, this first day of March, A. D. 1862.

Witness my hand and official seal.

[SEAL.] (Signed) PHILIP A. HOYNE,
*A Commissioner of Deeds, &c., for the State of Michigan, Residing in Illinois.*

I certify that P. H. Smith, Esq., vice-president of the Chicago and Northwestern Railroad Company, is the president of the Peninsula Railroad Company above named, and has made the foregoing petition at the request of the board of directors of said Co.

(Signed) CHARLES T. HARVEY, *Secretary.*

A letter, of which the following is a copy, was presented and read to the board in support of the application above mentioned, and by order entered of record therein:

Chicago and Northwestern Railway Co., Treasurer's Office.

CHICAGO, *February* 15, 1862.

To his excellency Governor Blair, *ex officio* president of the board of control of the State of Michigan.

236 SIR: The Chicago and Northwestern Railway Company begs leave to submit to the attention of the board of control of railroads in the State of Michigan the facts following, viz:

That it is the legal and residuary representative and holder of the road and franchises of the Chicago, St. Paul and Fond du Lac Rail-

road Company, referred to in act No. 90, approved March 4, 1861, of the session laws of 1861; that to that company, and the efforts which it inaugurated, is mainly due the credit of obtaining the munificent grants of land for railroad purposes made to the State of Michigan in the year 1856 by the Congress of the United States, that Co. being the only one which incurred the trouble and expense of collecting information and statistics, making maps and sending on proper persons and agents to Washington for two successive sessions, to call attention of congressmen from the districts to be benefited to the subject and to urge the claims of the northwest in that regard upon the attention of the National Legislature, and which efforts resulted so successfully.

That this company respectfully request the board of control to confer the grant of lands referred to in sec. one of the above mentioned, and agreeably to its provisions upon the Peninsula Railroad Company (as newly organized under the general laws of the State of Michigan) as a competent party to receive the same.

That this company of course desire to have the grant conferred upon those who would be most likely to make it available before it expires by limitation of the act of Congress, and believes that the honorable board will feel disposed to confer the grant as consistently as possible with the desires of this company, in consideration
237 of the facts that it has heretofore held the grant in time, which, from financial and political causes, rendered any hope futile for building the road, or almost any other, in more favored sections of the State and country; and that it was the original promoter of that grant and of all the other vast grants of land for similar purposes in the lower as well as upper portion of the "Great Peninsula State."

That this company endorses the Peninsula Railroad Company as the most likely to build the road in question of any which have been or probably will be organized for that purpose, and in conclusion it may be added, that should the construction of the act referred to seem to require an intermediate "competent party" in the opinion of the board, this company will, with or without further notice, appear as such competent party and ask that the reversion of the grant, if any, be at once vested in the said Peninsula Railroad Company.

Respectfully submitted by the Chicago and Northwestern Railway Company, by—

(Signed) W. B. OGDEN, *President.*

The application of the said The Peninsula Railroad Company being duly considered, the following order was unanimously adopted—that is to say:

On hearing the petition of the Peninsula Railroad Company, a corporation duly organized under the laws of the State for the purpose of constructing a railroad from Marquette, Lake Superior, to the Wisconsin State line, at or near the mouth of the Menominee river, showing to the satisfaction of this board that said Peninsula

Railroad Company is a competent party to undertake the
238 construction of the said railroad, and that said company intends in good faith so to do, and in pursuance of the powers granted to this board by section one of an act entitled "An act authorizing the transfer by the board of control of a grant of lands made to this State by act of Congress passed June 3, 1856, to aid in the construction of a railroad from Marquette, on Lake Superior, to the Wisconsin State line, and the relocation of the same," approved March 4, 1861—

It is now ordered by this board that all the lands, franchises, rights, powers, and privileges which are or may be granted in pursuance of said act of Congress approved June 3, 1856, to aid in the construction of a railroad from Marquette to the Wisconsin State line, be, and the same are hereby, conferred upon the said Peninsula Railroad Company, under the regulations and restrictions af an act approved February 14, 1857, entitled "An act disposing of certain grants of land made to the State of Michigan for railroad purposes by act of Congress approved June 3, 1856," and of all acts amendatory thereto.

And on application of said petitioners for leave to substitute a flat bar rail on their said proposed road in place of the T or continuous rail, and it appearing to this board that said substitution will be advantageous to the interests of the State and of said company—

It is further resolved that the said board of control do hereby authorize and empower said Peninsula Railroad Company to substitute a flat bar rail not less than two and a half inches wide and three-fourths of an inch thick on the line of railroad instead of the T or continuous rail.

The following preamble and resolution *was* offered and unanimously adopted:

239 Whereas the grant of lands made to the State of Michigan by act of Congress approved June 3, 1856, to aid in the construction of a railroad from Marquette, on Lake Superior, to the Wisconsin State line was heretofore conferred by the Legislature of this State upon the Marquette and State Line Railroad Company, which company was afterwards, by authority of law, consolidated with the Chicago, St. Paul and Fond du Lac Railroad Company of Wisconsin, which last-named company became insolvent, and its property in Wisconsin was transferred to another company; and this board, having by authority of an act of the Legislature of this State approved March 4, 1861, authorized the transfer of said grant of lands so made for the purpose aforesaid, now confer said lands, franchises, rights, powers, and privileges heretofore conferred upon the Marquette and State Line Road Company upon the Peninsula Railroad Company, a corporation duly organized under the laws of this State, who propose to relocate the route of said road as contemplated by said last-mentioned act, and to make the southern terminus at the mouth of the Menominee river, on Green Bay, which is deemed more practicable than the route previously adopted: Therefore—

Resolved, That this board of control of railroad land grants for the State of Michigan do hereby recommend and request that Congress do authorize the relocation of the lands granted for the purposes of the line of road from Marquette to the Wisconsin State line so as to conform to the new line that shall be surveyed and adopted by the said Peninsula Railroad Company, terminating at the mouth of the Menominee river, and to the same effect and extent as if such grant had been originally intended to embrace the route so designated and the same had been originally conferred upon said Peninsula Railroad Company.

Defendant's counsel also introduced in evidence articles of consolidation, dated October 21st, 1864, between the aforesaid Chicago and Northwestern Railway Company and the aforesaid Peninsula Railroad Company, whereby the said two corporations became and were duly consolidated into one corporation under and by virtue of the laws of the State of Michigan, to be known as the Chicago and Northwestern Railway Company, and among the provisions of said articles of consolidation were the following:

Article thirteenth. All and singular the rights, franchises, privileges, real estate, lands, land grants, depot grounds, rights of way, road-bed, railroad, iron rails, engines, cars, machinery, rolling stock, debts, dues, demands, things in action, and property of every description, name, and nature, in which the said parties hereto respectively have any right, title, or interest, whether in possession, reversion, or remainder, with the appurtenances, shall henceforth be held, owned, possessed, and controlled by the consolidated company by this agreement formed as fully and completely to all intents and purposes as the said parties hereto respectively do or can hold, own, use, or control the same, and no further conveyance or assurance shall be necessary to fully and completely vest the same in the said consolidated company hereby formed.

It was admitted on the part of the plaintiff that the Chicago and Northwestern Railway Company, as consolidated with the Peninsula Railroad Company, changed the route of the line of railroad from Marquette to the State line, as authortzed by the joint resolution of Congress, dated July 5, 1862, and constructed its route upon said changed line from Marquette to the mouth of the Menominee river, and received lands therefor along or near the new line and outside of the limits of the line surveyed from Ontonagon to the State line.

Defendant's counsel further offered in evidence the articles of incorporation of the Ontonagon and Brule River Railroad Company, showing the incorporation of said company under the railroad laws of the State of Michigan September 10, 1880.

Defendant's counsel further introduced in evidence the record of the proceedings of the board of control of railroad lands for the State of Michigan and of the acceptance of the Ontonagon and Brule River Railroad Company, of which the following are copies:

241 **Proceedings of board of control declaring grant of lands to Ontonagon and State Line railroad forfeited to State, and vesting the same in the Ontonagon and Brule River Railroad Company.**

OFFICE OF THE SECRETARY OF THE BOARD OF CONTROL OF RAILROAD LANDS FOR THE STATE OF MICHIGAN.

**Resolution of the board of control of railroad lands for the State of Michigan, adopted September 17th, 1880.**

Whereas by the act of Congress of June 3rd, 1856, there was granted to the State of Michigan certain lands for the construction thereon of various railroads, and, among others, for a railroad from Ontonagon to the Wisconsin State line, which grant was subsequently and by the act of the Legislature of Michigan of 14th of February, 1857, conferred upon and vested in the "Ontonagon and State Line Railroad Company," and which grant was accepted by said railroad company or its successors, "The Chicago, St. Paul and Fond du Lac Railroad Company," and said company or its successors located the line of its road and made maps thereof and filed copies of such maps in the offices of the Governor and secretary of state of this State, as required by section six of said act of the Legislature of the State of Michigan, but failed to construct said line of road or any part thereof in the time and manner required by said act, and has ceased for twenty years past to do any corporate act or acts whatever, and had practicallyceased to exist;

And whereas by the terms of said act it becomes and is made the duty of the board of control of railroad lands for the State of Michigan, in case any road shall so fail to construct such road or any part thereof in the time and manner required, to declare said lands so appropriated as forfeited to the State of Michigan, and to
242 confer said lands upon some other competent party, under the general regulations and restrictions of the said act;

And whereas "the Ontonagon and Brule River Railroad Company," a body corporate under the laws of Michigan, have presented their memorial to this board asking that said grant, so made by said act of Congress for the construction of a railroad between said Octonagon and the Wisconsin State line, be conferred upon them and their successors, subject to the general regulations and restrictions of said act of February 14, 1857, they on their part agreeing to undertake and complete the construction of such road as in said memorial is stated and expressed;

And whereas it is desired that said grant may be preserved to the State of Michigan, and especially to that portion of the State through which it is proposed to construct said road;

And whereas said grant, in default of the construction of such road by the terms of said act of Congress, reverts to the United States;

And whereas no other party, person, or corporation, except said

"Ontonagon and Brule River Railroad Company," has or does apply for said grant;

And whereas it appears that said company is composed of and represents parties capable of carrying out their purpose as expressed in said memorial, and that such application is made to this board in apparent good faith and with honest intent, and that the lands embraced in said grant are so subject to disposition by this board for the purposes originally contemplated by said act: Therefore

Resolved by the board of control of railroad lands for the State of Michigan as follows:

243 First. That the grant of said lands as heretofore made to the Ontonagon and State Line Rallroad Company, by reason of the default of said railway company as above recited, is hereby declared forfeited to the State of Michigan; and

Second. It is further resolved that the board of control of railroad lands for the State of Michigan, by virtue of the power in them vested, do hereby designate the "Ontonagon and Brule River Railroad Company" as the proper and competent party to receive said grants of lands for the purpose of aiding in the construction of said road; and they do therefore hereby release to and confirm upon said "Ontonagon and Brule River Railroad Company," their successors and assigns, all and every the right, title, and interest which now remains in said State of Michigan to the said lands, be the same more or less, for the purpose of constructing and completing a railroad from Ontonagon to the Wisconsin State line upon the line located by said Ontonagon and State Line railroad or by its successor, "the Chicago, St. Paul and Fond du Lac Railroad Company," under the general regulations and restrictions of said act of the Legislature of the State of Michigan, passed February 14th, 1857, and such other and further conditions as may be imposed by the Legislature of Michigan.

And said "Ontonagon and Brule River Railroad Company" is hereby required, by a vote of the majority of the directors thereof, to accept the land, franchises, rights, powers, and privileges hereby conferred, which acceptance shall be embodied in a written instrument signed by the president and attested by the corporate seal of said company and filed in the office of the secretary of state of the State of Michigan within sixty days from this date.

244 A true copy.

I hereby certify the foregoing to be a true copy of the original resolution as the same appears of record.

D. BETHUNE DUFFIELD,
*Secretary of the Board of Control of Railroad Lands.*

DETROIT, *Oct.* 25, 1880.

This instrument certifies that at a meeting of the board of directors of the Ontonagon and Brule River Railroad Company, held at the office of Benton Hanchett, in the city of Saginaw, Michigan, at which all of the members of said board of directors were present, the lands, franchises, rights, powers, and privileges conferred upon said railread company by the board of control of railroad lands for the

State of Michigan by the action and resolutions of said board of control adopted at the meeting of said board of control held on the 16th day of September, 1880, were accepted by the said Ontonagon and Brule River Railroad Company by the vote of all the directors of said railroad company.

And the said directors of said railroad company, by the votes of all of them at their said meeting voting therefor, adopted, for the purpose of such acceptance, the following resolution, viz:

"Whereas the board of control of railroad lands for the State of Michigan, at their meeting on the 16th day of September, 1880, by their action and resolutions adopted on that day, conferred upon the Ontonagon and Brule River Railroad Company the lands, franchises, rights, powers, and privileges granted by act of Congress of June 3, 1856, to the State of Michigan to aid in the construction of a railroad from Ontonagon to the Wisconsin State line, which
245 lands, franchises, rights, powers, and privileges were accepted by the Legislature of the State of Michigan, and were conferred upon the Ontonagon and State Line Railroad Company by the act of said Legislature approved February 14, 1857: Therefore it is hereby—

Resolved, That the said Ontonagon and Brule River Railroad Company does hereby accept said lands, franchises, rights, powers, and privileges so conferred upon it by said board of control under the regulations, restrictions, and conditions stated in said action and resolutions of said board of control; so that this acceptance is absolute and complete.

Resolved further, That this acceptance be embodied in a written instrument signed by the president and attested by the secretary and corporate seal of the said Ontonagon and Brule River Railroad Company and filed in the office of the secretary of state of the State of Michigan."

In witness whereof the said Ontonagon and Brule River Railroad
[SEAL.] Company has caused this written instrument to be signed by its president and attested by its secretary and corporate seal this 28th day of September, A. D. 1880.

EZRA RUST,
*President of the Ontonagon and Brule River Railroad Company.*

Attested: REUBEN KIMBALL,
*Secretary of the Ontonagon and Brule River Railroad Company.*

Defendants' counsel further introduced in evidence a certified copy of the declaratory statement offered by Walter A. Cunningham and rejected by the register and receiver of the land office at Marquette, Michigan, June 14th, 1888, of which statement, with
246 the indorsement of the register and receiver thereon, the following is a copy:

*Declaratory Statement.*

I, Walter A. Cunningham, of the township of Iron River, Mich., being a citizen of the United States and 21 years of age, have on the

25th day of May, A. D. 1888, settled and improved the S. W. ¼ of sec. 25, town. 44 north, of range 36 west, containing 160 acres, which land has not yet been offered at the reduced price and thus rendered subject to private entry; and I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of said act of 4th of Sep., 1841.

Given under — this 25th day of May, A. D. 1888.

WALTER A. CUNNINGHAM.

In presence of—
YOUNG CAMPBELL.

P. S.—I have lived with my family on the above land since the 28th day of March last.

I inclose $2.00.

(Endorsement.)

U. S. LAND OFFICE,
MARQUETTE, MICH., *June* 4, 1888.

The within application with the required fee tendered was this day rejected for the reason that the land applied for has been selected by and certified to the State of Michigan for the P. L. & L. S. S. C. Co., act July 3, 1866, list No. 4, approved May 22, 1871.

SAM'L E. BYRNE, *Register.*
M. H. MAYNARD, *Receiver.*

The defendant WALTER A. CUNNINGHAM, being sworn in his own behalf, testified as follows:

247 I entered into the possession of the S. W. ¼ of section 25, township 44 north, of range 36 west, being the land involved in this action against me, on the 12th day of March, 1888.

Defendants' counsel asked the witness the following question:

"Q. After going into possession, what application, if any, did you make?"

Plaintiff's counsel objected thereto on the ground that said evidence was irrelevant and upon the further ground that, according to the claim of the defendant as developed upon this trial, the land claimed by the defendant was not subject to pre-emption, and that the defendant could not proceed upon two conflicting theories: first, that the land was State land, the title thereto being in the State by virtue of the railroad grants, and, second, that the land was the public land of the United States subject to pre-emption, which objection was overruled, and plaintiff's counsel excepted thereto.

The witness answered: I made application for the land under the pre-emption law. I made the application at Iron River and forwarded it to the district land office here. Since then I have remained in possession of the land. I made a second application April 27, 1889 (which was produced).

Said second application was introduced in evidence and the following is a copy thereof:

"I, Walter Cunningham, of Iron River, Michigan, being over twenty-one years of age and a citizen of the United States, have on the 12th day of March, A. D. 1888, settled upon and improved the southwest quarter of section 25, in township 44 north, of range 36 west, in the Marquette land district, Mich., and contains 160 acres and had on the 1st day of May, 1888, a *bona fide* pre-emption claim thereon, which claim arose and was asserted by my actual
248 occupation of said lands under color of the laws of the United States, and which land is not subject to private entry; and I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of the Revised Statutes of the United States and supplementary legislation, including the acts of Congress approved March 2, 1889. My post-office address is: Iron River, Iron county, Michigan.

Given under my hand this 27th day of April, 1889.

WALTER CUNNINGHAM.

In presence of—
YOUNG CAMPBELL,
*Of Iron River, Michigan, and*
GEORGE H. FISHER,
*Of Iron River, Michigan.*

STATE OF MICHIGAN, } ss:
*County of Iron,* }

I, Walter Cunningham, being first duly sworn, depose and say that I am an actual settler upon the lands described in the foregoing declaration; that on the first day of May, 1888, I had a *bona fide* pre-emption claim to said lands; that such claim arose and was asserted by my actual occupation thereof under color of the laws of the United States, and that I have ever since then and am now such settler and occupant.

WALTER CUNNINGHAM.

Subscribed and sworn to before me this 27th day of April, 1889.

YOUNG CAMPBELL,
*Justice of the Peace.*

I forwarded the first application on May 25th, 1888, the date it was dated. The second application was presented at the land office at Marquette May 1st, 1889, in person.

Plaintiff's counsel here objected to the evidence of the second application and filing on the ground that said proceedings had
249 been taken since the suit against said Walter Cunningham was commenced, and could not affect the result of this suit.

Which objection was overruled by the court, the evidence received, and plaintiff's counsel excepted thereto.

Defendant's counsel asked the following:

"What improvements, if any, did you make upon these lands or have you made upon them?"

Plaintiff's counsel objected thereto as being irrelevant, and also for the reason that the question of improvements and whether the defendant Cunningham had complied with the pre-emption laws so as to entitle him to rights in the land as such was a matter exclusively within the jurisdiction of the Interior Department.

Which objection was overruled by the court; to which ruling plaintiff's counsel excepted.

The witness thereupon answered said question and testified to his occupancy and improvements as follows:

I built a house and dug a well and cleared a small piece around the house. The house is 16 x 18, one story, two windows and a door, floor, and board roof. I am a married man, and moved my family on the land on the 28th of March, 1888. I resided there continuously, except that I went away on the 13th of September, 1888, and returned on the 28th day of October, and was away three weeks at another time. I was in continual possession up to the time I went away, September 13th. Up to July 17th, 1888, I made a small clearing, perhaps one-eighth of an acre. Up to that time I was fixing up my house, so it would be habitable, digging a well, and so on.

Said defendants' counsel then offered to prove acts of the defendant Cunningham by way of residence and improvement
250 subsequent to July 17th, 1888. Plaintiff's counsel objected to all testimony in relation to the pre-emption claim of said defendant after that date, on the ground that the same was not receivable under the plea filed in this case, as it was a matter of defense arising subsequent to the commencement of this suit; which objection was overruled, and plaintiff's counsel excepted.

The witness thereupon testified that since July 17th, 1888, I have cleared about three acres, with the exception of a few logs that I could not handle; what pine there was I left standing. I put in a quarter of an acre of potatoes, some turnips, a few small patches, and the rest of it is seeded to grass. I was away from there about three weeks just before Christmas of 1888. Since then I have not been away from there, except as people generally go. I was upon the land the latter part of April or the first of May, 1888, and also in 1889.

Upon cross-examination the witness testified as follows:

I went on the land because I wanted a home. I supposed that the land was in dispute, but was under the impression that it would be settled in my favor. I was told that it was a railroad grant. I did not know to a certainty that the canal company claimed it until my application was rejected. I read of these railroad grants in the papers and talked with various parties about it. I heard it noised around that it was canal company land, but I did not know it of a certainty until my application was rejected. I saw some of

the woodsmen, agents of the canal company, looking over lands in that part of the country in May, 1888. Before I made my settlement there I lived in Spring Arbor, in Jackson county, in this State. I went up there for the purpose of taking a piece of land. I heard that the canal company owned the land, and that it was claimed by a railroad company. When I came up there to take the land
251 I understood that this land was embraced in the grant to the State for the benefit of some railroad company and so understood when I went on the land. I expected that some time in the future the grant would be removed and I could get the land. I did not understand that it was United States land at the time I went onto it. When I made the first application and filed a declaratory statement at the Land Office I was informed that my application was rejected because it had been certified to the State of Michigan for the canal company. The declaratory statement, with the rejection indorsed thereon, was returned to me.

It was here conceded that the defendant appealed from said rejection to the General Land Office; that the said rejection was confirmed by the Commissioner of the General Land Office, from which decision the defendant appealed to the Secretary of the Interior.

Witness further testified:

I took my family to this land on the 28th day of March, 1888, and they remained there until the 26th day of June of the same year in the house that I had built. My family then went to Southern Michigan and remained there until the 28th of October, 1888. They have been there ever since, except the three weeks I spoke of, along in the winter. The first year I cultivated about one-eighth of an acre. I cut out all the trees except the pine and planted part of it to potatoes and seeded the rest of it to grass. I prepared the ground for the potatoes with a grub-hoe. The three acres that I cleared since then is merely chopped down and piled up. The land in question is heavily timbered. I went there for the purpose of getting a farm and getting the timber, too. It is partly timbered with pine. I can't say exactly how much pine. I should think there
252 was a million and a half feet or more. The pine standing is worth about five dollars per thousand. The pine on the land is perhaps worth $7,500. I could not say whether it is worth as much to clear the land as the land, aside from the pine, is worth. I think if it was cleared up in shape to cultivate it would be — valuable as the pine is that now stands there.

The defendant HUGH FINAN, being sworn in his own behalf, testified as follows:

I went into the possession of the northeast quarter of section 13, town. 44 north, of range 36 west, the 12th, 13th, or 14th of May, 1888.

Plaintiff's counsel here objected to all testimony on the part of said defendant in relation to any claim of pre-emption right thereto

as entirely immaterial in this case. Said objection was overruled by the court, and plaintiff's counsel excepted thereto.

The witness further testified:

At the time I settled on the land I understood that it was belonging to the grant to the Brule River and Ontonagon Railroad Company and was going to be reverted back to the Government. Acting on that information, I went on the land and built a house and cleared up, I should think, a little over half an acre. Since then I have not cleared up any. I made my application for pre-emption claim some time in the fall.

Defendants' counsel here introduced in evidence a certified transcript of the declaratory statement offered by said Hugh Finan and rejected by the register and receiver December 4th, 1888; of which said declaratory statement, with the indorsement thereon, and
253 signed by the register and receiver, the following is a copy:

*Declaratory Statement for Cases where the Land is not Subject to Private Entry.*

I, Hugh Finan, of Iron River, Mich., being over twenty-one years of age and a citizen of the United States, have, on the 1st day of November, A. D. 1888, settled and improved the northeast (N. E. ¼) quarter of section number 13, in township number 44 N. of range number 36 W., in the district of lands subject to sale at the land office at Marquette, Mich., and containing 160 acres, which land has not yet been offered at public sale and thus rendered subject to private entry; and I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of said act of 4th September, 1841.

Given under my hand this 23rd day of November, A. D. 1888.

HUGH FINAN.

In presence of—
G. H. SHIELDS.

(Endorsement.)

U. S. LAND OFFICE,
MARQUETTE, MICH., *Dec.* 4, 1888.

The within application, with the required fee tendered, is this day rejected, for the reason that land applied for has been selected by and certified to the State of Michigan for the P. L. & L. S. S. C. Co., act July 3, 1866, list No. 4, approved May 22, 1871.

SAM'L E. BYRNE, *Register.*
M. H. MAYNARD, *Receiver.*

It was admitted that said applicant appealed from said rejection to the General Land Office; also that he renewed his application on May 1st, 1880, which was rejected; that he appealed from said rejection to the Commissioner of the General Land Office, which appeal is still pending.

Witness further testified that he had been in possession of said land since the time of his first entry until the present time.

254 Defendants' counsel further introduced in evidence a letter from the commissioner of the general land office of the State of Michigan, of which the following is a copy:

"STATE OF MICHIGAN:

Office of Roscoe D. Dix, state land commissioner.

LANSING, 14 *May*, 1890.

Ben. Vosper, Esq., Ionia, Michigan.

DEAR SIR: In reply to your letter of the 13th inst. I have to inform you that the State has selected from the General Government 30,000 acres of land in lieu of lands belonging to the State, but sold by the U. S. between Sept. 30, 1850, and Jan'y 1, 1852. This 30,000 acres has been selected and patented to the State in varying quantities and at various times up to the present.

The State has also scrip for 6,000, entitling it to select that number of acres from the Government domain.

HENRY S. SLEEPER,
*Dep'y State Land Commissioner.*"

Plaintiff's counsel objected thereto as irrelevant to the issue, waiving all other objections. Said objection was overruled by the court and the letter was received, to which plaintiff's counsel excepted.

It was admitted by the plaintiff's counsel that said letter related to indemnity lands selected by the State of Michigan in lieu of other State lands which had been sold by the United States and did not relate to these particular lands.

255 It was further admitted by defendants' counsel that neither the Ontonagon and State Line Railroad Company or any other railroad company organized for that purpose ever built any part of the line of the Ontonagon and State Line Railroad Company; that no railroad was ever built upon that line until the year 1880, and then only twenty miles, commencing at the mouth of the Ontonagon river and extending southerly from that point, not reaching anywhere near the land in question, which was built by the Ontonagon and Brule River Railroad Company; that the title of said company to said land was repudiated by the Government and said company never succeeded in getting any of the land embraced in said grant, and that the grants for the Ontonagon and State Line Railroad Company were never earned by any railroad company.

Defendants' counsel further offered to show that the plaintiff in this case has not, nor has any of the corporations from which it claims title to these lands, ever constructed or operated any railroad under its charter; that the only franchise it has exercised has been the construction and operation of the canal through Portage Lake, and that the lands in question are not used by a corporation in connection with that business, but are simply held by the corporation.

Defendants' counsel stated the object of said testimony to be for whatever effect — might have upon this "trifold corporation" (referring to the plaintiff), and also under the constitutional provision of the State of Michigan which prohibits a corporation from holding lands for a period of over ten years unless in connection with their business and necessary to their franchises.

Plaintiffs counsel objected to said offer as incompetent and
256 irrelevant, and, further, that the existence of the plaintiff as a corporation could not be questioned in this collateral matter. The court overruled the objection, to which ruling plaintiff's counsel excepted.

Subject to said objection plaintiff's counsel admitted that, as matter of fact, neither the plaintiff nor any of its predecessors had ever constructed any railroad under its charter, and that the lands in question were not used in connection with the operation of its canal.

*Rebuttal.*

Plaintiff's counsel, by way of rebuttal, introduced in evidence a release executed by the Peninsula Railroad Company to the United States, of which the following is a copy:

Whereas the grant of lands heretofore made by the State of Michigan to the Marquette and State Line Railroad Company under the act of Congress approved June 3, 1856, to aid in the construction of a railroad from Marquette, on Lake Superior, to the Wisconsin State line, has been forfeited by said Marquette and State Line Railroad Company and has been conferred by the board of control of railroad land grants of the State of Michigan, under the authority granted by the act of the Legislature of the State of Michigan, approved March 4th, 1861, entitled "An act authorizing the transfer by the board of control of a land grant made to this State by an act of Congress passed June 3, 1856, to aid in the construction of a railroad on Lake Superior to the Winconsin State line and the relocation of the same," upon the Peninsula Railroad Com-
257 pany, a railroad corporation oganized under the laws of the State of Michigan; and whereas it is contemplated by the act last referred to that the lines of railroad should be relocated so as to terminate at or near the mouth of the Menominee river, on Green Bay, and not on the Brule river, as heretofore located by said Marquette and State Line Railroad Company; and whereas the Congress of the United States, by joint resolution No. 38, approved July 5, 1862, has authorized the change and relocation of said railroad and of the land grant made to aid in the construction of the same:

Now, therefore, the said Peninsula Railroad Company, in consideration of the premises and in consideration that the United States will cause or permit the relocation of said land grant so as to conform to said new line under the provisions of said resolution and the acts aforesaid, do hereby release and surrender to the United States of America all right, claim, and interest in and to so much

of the lands heretofore located on the original proposed line of the Marquette and State Line railroad, from Marquette to the Brule river, in township forty-two (42) north of range thirty-five (35) west, sufficient to cover one hundred and sixty-one thousand one hundred and four and thirty-eight one-hundredths acres (161,104.38) of land as approved by certificate thereof filed in the General Land Office of the United States on the 12th day of December, 1861, which the said Peninsula Railroad Company may have acquired under the grant and location aforesaid and the transfer thereof to said company as lie between the mouth of the Brule river and the township line between ranges numbers twenty-eight and twenty-nine west of the meridian of Michigan.

258 In witness whereof the said Peninsula Railroad Company has caused its corporate seal to be affixed, attested by the signatures of its president and secretary, this sixth day of May, 1863.

[SEAL.]

(Signed) CHARLES T. HARVEY,
*President pro tempore.*

(Signed) NATHAN E. PLATT, *Secretary.*

Plaintiff's counsel further introduced in evidence articles of agreement and other documentary evidence showing the consolidation of the Ontonagon and State Line Railroad Company and the Marquette and State Line Railroad Company, hereinbefore mentioned, with the Chicago, St. Paul and Fond du Lac Railroad Company, a corporation of the States of Illinois and Wisconsin, whereby said three companies became consolidated into one corporation under the name of the Chicago, St. Paul and Fond du Lac Railroad Company, and whereby all rights, franchises, lands, and land grants and property of every description belonging to either of said original corporations became and were vested in said consolidated corporation pursuant to the laws of the States of Michigan, Wisconsin, and Illinois.

Plaintiff's counsel also introduced in evidence the record in the office of the register of deeds of the proper county of a mortgage executed by the Chicago, St. Paul and Fond du Lac Railroad Company, being the corporation formed by the consolidation of the three corporations last above mentioned, to William A. Booth, James A. Lanier, and William B. Ogden, as trustees, bearing date the 6th day of April, 1857, to secure the payment of certain bonds issued by said corporation. Said mortgage recited the consolidation of the

259 three corporations above named under the name and style of the Chicago, St. Paul and Fond du Lac Railroad Company and the vesting in said corporation of all the property, rights, and franchises of said three original corporations; also reciting, among other things, the grant of lands to the State of Michigan under the act of Congress approved July 3, 1856, and the act of the Legislature of the State of Michigan approved February 14th, 1857, conferring said grant upon the Marquette and State Line Railroad Company and said Ontonagon and State Line Railroad Company, and the fact that all rights of both said corporations in said land

grant had become vested in the consolidated company by the consolidation aforesaid, and purported to convey to said trustees as joint tenants, as security for said bonds, and their survivors and successors in the trust therein created the "entire railroad of said company from the city of Chicago through the cities of Janesville and Fond du Lac to Lake Superior, with two termini on said lake, one at or near Marquette or mouth of Carp river and the other at or near Ontonagon or the mouth of the Ontonagon river, being a direct line between Chicago and said Marquette and Ontonagon, whether said lines be called and known as the main trunk lines or some of them as branches of the main trunk line," and also all other real and personal property of said corporation.

Said mortgage expressly covered and conveyed as security for said bonds "all the right, title, interest, claim, or demand which the said party of the first part has or hereafter shall acquire in or to one million acres of public lands of the United States situated, lying, and being in the States of Wisconsin and Michigan, adjoining and adjacent to the above-described railroad and branches between Fond du Lac or Lake Winnebago and Ontonagon and Marquette, on Lake Superior, as hereinbefore described, being
260 parts and parcels of the lands which were granted to the States of Wisconsin and Michigan by the aforesaid acts of Congress approved June 3, 1856, and by the States of Wisconsin and Michigan granted to the assignors and predecessors of the party of the first part and subsequently by consolidation conferred upon, assigned to, and confirmed to the party of the first part, as hereinbefore stated."

And said mortgage provided for the taking possession by the trustees in case of default, and for the sale, and empowered the trustees and their successors to sell all said mortgaged property at public auction upon notice thereof prescribed.

Said plaintiff's counsel also introduced in evidence the record of a deed from said trustees, dated June 2, 1859, to Samuel J. Tilden and Ossian D. Ashley, which deed recited the aforesaid mortgage, the issue of bonds thereunder and default thereof, the giving of notice of sale as prescribed by said mortgage, and the sale of all the property mentioned in said mortgage at public auction, at the city of Janesville, on said 2d day of June, 1859, in accordance with the power of sale contained in said mortgage, for the sum of forty thousand dollars, and purported to convey to said Samuel J. Tilden and Ossian D. Ashley all the property described in said mortgage, including all the rights of said Chicago, St. Paul and Fond du Lac Railroad Company in and to the lands embraced in the land grants above mentioned.

Plaintiff's counsel also introduced in evidence the record of a deed bearing date the first day of July, 1859, from Samuel J. Tilden and Ossian D. Ashley, above named, to the Chicago and Northwestern Railway Company. Said deed recited the purchase by said Tilden and Ashley under the mortgage sale and deed afore-
261 said, and recited the fact that the said Chicago and Northwestern Railway Company was a "corporation duly formed

and organized in pursuance of the act of the State of Wisconsin entitled 'An act to facilitate and authenticate the formation of a corporation by the purchasers of the Chicago, St. Paul and Fond du Lac Railroad Company,' approved March 14th, 1859, and of the laws of the State of Wisconsin, and is a corporation duly formed and organized in pursuance of the act of the State of Illinois entitled 'An act to authorize the sale of the Chicago, St. Paul and Fond du Lac Railroad Company, and to enable the purchasers thereof to form a corporation,' approved February 19th, 1859, and of the laws of the State of Illinois, and purported to convey to said Chicago and Northwestern Railway Company all the lands, land grants, rights, franchises, and other property conveyed to them by the trustees under said mortgage, as aforesaid."

Plaintiff's counsel also introduced in evidence the record of a deed dated June 30th, 1859, made by the aforesaid Chicago, St. Paul and Fond du Lac Railroad Company, named therein as a corporation existing under and by virtue of the laws of the States of Illinois, Wisconsin, and Michigan, to Samuel J. Tilden and Ossian D. Ashley, which deed recited the execution of the mortgage aforesaid, referring thereto by date and place of record, reciting the default in the condition of said mortgage and the sale by the trustees therein named on the 2d of June, 1859, under the power of sale conferred in said mortgage, of all the lands, hereditaments, property, franchises, rights, and things in the said deed described and mentioned and the conveyance thereof by said trustees to said Tilden and Ashley; also reciting the organization of the Chicago and Northwestern Railway Company, as hereinbefore stated, and that said grantees, said Tilden and Ashley, were about to convey said railway, property, franchises, rights, and things to the said corporation, and therefore, in
262 in consideration thereof and of one dollar, the said Chicago, St. Paul and Fond du Lac Railroad Company did grant, bargain, sell, remise, release and convey, unto said Tilden and Ashley all the property, rights, and franchises mentioned and set forth in said mortgage, including all rights of the said Chicago, St. Paul and Fond du Lac Railroad Company in and to the land grants in the States of Michigan and Wisconsin above mentioned.

Plaintiff's counsel further introduced in evidence a certified list of lands certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior to the State of Michigan, containing 32,305.93 acres within the six-miles limits of the Chicago, St. Paul and Fond du Lac railroad (being the Ontonagon Branch) and the Marquette and Ontonagon railroad, where they intersect and cross each other.

Plaintiff's counsel further introduced in evidence a release from the Chicago and Northwestern Railway Company to the State of Michigan, of which the following is a copy:

Whereas by act of Congress of the United States, approved on the third day of June, A. D. 1856, entitled "A bill making a grant of lands to the State of Michigan in alternate sections to aid in the construction of railroads in said State," every alternate section of

land designated by odd numbers for six sections in width on each side of said roads, was granted to said State of Michigan to aid in the construction of railroads from Marquette to the Wisconsin State line;

And whereas by a joint resolution of the Congress of the United States relative to a certain grant of lands for railroad purposes, made to the State of Michigan in eighteen hundred and fifty-six,
263 approved on the fifth day of July, eighteen hundred and sixty-two, the words "Wisconsin State line," in the first aforesaid act of Congress were authorized to be so construed as to authorize the location of the line of railroad therein provided for from Marquette to said State line upon any eligible route from the township of Marquette aforesaid to a point on the Wisconsin State line near the mouth of the Menominee river, and touching at favorable points on Green Bay, and the line of railroad as then located in pursuance of said act from Marquette aforesaid to said Wisconsin State line, according to records of the General Land Office, was authorized to be changed so as to conform to the route in said act as indicated, as aforesaid;

And whereas it was further provided in said joint resolution that upon the filing in the General Land Office of the lists of said railroad lands, in whole or in part, as now selected and certified in the General Land Office, with the certificate of the Governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claim to the lands aforesaid set forth and described in the lists thereof thus certified, and that the same have never been pledged or sold or in anywise incumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of land, selected in like manner upon the new line of road as thus surrendered upon the first line, and to the extent of six sections per mile in the aggregate of every mile of the new line, according to the general provisions of the act of June third, eighteen hundred and fifty-six, making it the duty of the Commissioner of the General Land Office to re-offer for public sale, in the usual manner, the lands aforesaid when duly filed in his office as herein directed;

264 And whereas the lands granted to said State as aforesaid were granted by said State of Michigan to the Peninsula Railroad Company by act approved on the eighteenth day of March, A. D. 1863;

And whereas said last-named railroad company consolidated with the Chicago and Northwestern Railway Company, a corporation of the said States of Michigan, Wisconsin, and Illinois, which last-named company is possessed of all the rights, privileges, and property of said Peninsula Railroad Company;

And whereas by an act of Congress of the United States entitled "An act to extend the time for the completion of said railroads to which land grants have been made in the States of Michigan and Wisconsin," approved on the third day of March, A. D. 1865, there was granted to the State of Michigan, for the purpose of aiding in the construction of a railroad from Marquette, on Lake Superior, to

the Wisconsin State line, at or near the mouth of the Menominee river, for the benefit and use of the Chicago and Northwestern Railway Company, four additional alternate sections per mile to that already granted by the said act of Congress approved June third, 1856, and joint resolution supplementary thereto, said lands to be selected within twenty miles of said road;

And whereas lists of said railroad lands granted by said act of 1856 to aid in the construction of said railroad from Marquette to the Wisconsin State line, as the same was originally located, have been filed in the General Land Office:

Now, therefore, the said Chicago and Northwestern Railway Company, in consideration of the premises, does hereby remise, release, and forever quitclaim unto the said State of Michigan and its assigns forever all the right, title, and interest it now has or has
265 ever had in and to the following pieces or parcels of land situate, lying, and being in the said State of Michigan, and conveyed and certified to said State in accordance with the several acts of Congress hereinbefore specifically referred to—that is to say:

(Here follow the descriptions of lands embraced in the three lists hereinbefore mentioned, to wit: First, the lands within the six-miles clear limits of the railroad from Marquette to the Wisconsin State line, containing 112,145.38 acres. Second, list of lands with- the six-miles limits of the lines of railroad from Ontonagon to the State, line, and from Marquette to the State line, where they intersect and cross each other, containing 41,649.25 acres. Third, list of lands within the six-miles limits of the line of railroad from Ontonagon to the Wisconsin State line, and the Marquette and Ontonagon railroad, where they intersect and cross each other, containing 32,305.93 acres.)

And the said Chicago and Northwestern Railway Company do hereby covenant and agree to and with the State aforesaid that the lands above described and released hereby have never been pledged, sold, or in anywise incumbered, either by the said Peninsula Railroad Company or by itself.

In testimony whereof the said Chicago and Northwestern Railway Company have hereunto affixed the corporate seal of the
[SEAL.] said company and caused these presents to be signed by their vice-president and attested by their assistant secretary, this 31st day of January, A. D. 1868.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.
P. H. SMITH, *Vice-President.*

Attest: J. B. REDFIELD, *Ass't Secretary.*

Signed, sealed, and delivered in presence of—
E. H. GRAVES.
J. H. HOWE.

Said deed was duly acknowledged.

266 Plaintiff's counsel further introduced in evidence a release from the Governor of the State of Michigan to the United States, dated May 1st, 1868, of which the following is a copy:

Whereas by act of Congress of the United States approved on the third day of June, A. D. 1856, entitled "A bill making a grant of lands to the State of Michigan in alternate sections to aid in the construction of railroads in said State," every alternate section of land designated by odd numbers for six sections in width on each side of said roads was granted to said State of Michigan to aid in the construction of railroads from Marquette to the Wisconsin State line;

And whereas by a joint resolution of the Congress of the United States relative to a certain grant of lands for railroad purposes made to the State of Michigan in eighteen hundred and fifty-six, approved on the fifth day of July, eighteen hundred and sixty-two, the words "Wisconsin State line," in the first aforesaid act of Congress, were authorized to be so construed as to authorize the location of the line of railroad therein provided for from Marquette to said State line upon any eligible route from the township of Marquette aforesaid to a point on the Wisconsin State line near the mouth of the Menominee river and touching at favorable points on Green Bay, and the line of railroads as then located in pursuance of said act from Marquette aforesaid to said Wisconsin State line, according to the records of the General Land Office, was authorized to be changed so as to conform to the route in said act indicated as aforesaid;

And whereas it was further provided in said joint resolution that upon the filing in the General Land Office of the lists of said railroad lands, in whole or in part, as now selected and cer-

267 tified in the General Land Office, with the certificate of the Governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claim to the lands as aforesaid set forth and described in the lists thereof thus certified, and that the same have never been pledged or sold or in anywise incumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of lands, selected in like manner upon the new line of road, as thus surrendered upon the first line, and to the extent of six sections per mile in the aggregate of every mile of the new line according to the general provisions of the act of June third, 1856, making it the duty of the Commissioner of the General Land Office to re-offer at public sale, in the usual manner, the lands aforesaid, when duly filed in his office as herein directed;

And whereas the lands granted to said State as aforesaid were granted by said State of Michigan to the Peninsula Railroad Company by act approved on the eighteenth day of March, A. D. 1863;

And whereas said last-named railroad company consolidated with the Chicago and Northwestern Railway Company, a corporation of the said States of Michigan, Wisconsin, and Illinois, which last-named company is possessed of all the rights, privileges, and property of the said Peninsula Railroad Company;

And whereas by an act of the Congress of the United States entitled "An act to extend the time for the completion of certain rail

roads to which land grants have been made in the States of Michigan and Wisconsin," approved on the third day of March, A. D. 1865, there was granted to the State of Michigan, for the purpose of aiding in the construction of a railroad from Marquette, on Lake Superior, to the Wisconsin State line at or near the mouth
268 of the Menominee river, for the benefit and use of the Chicago and Northwestern Railway Company, four additional alternate sections per mile to that already granted by said act of Congress approved June third, 1856, and joint resolution supplementary thereto, said lands to be selected within twenty miles of said road;

And whereas lists of said railroad lands granted by said act of 1856, to aid in the construction of said railroad from Marquette to the Wisconsin State line, as the same was originally located, have been filed in the General Land Office;

And whereas the said Chicago and Northwestern Railway Company has released and surrendered all its claim to the premises hereinafter described to the said State of Michigan, and as required by the aforesaid joint resolution, approved July 6th, 1862:

Now, therefore, I, Henry H. Crapo, Governor of the State of Michigan, by virtue of the statute of said State in this case provided, do hereby certify that the said State of Michigan and its assigns have, and hereby do, surrender and release to the United States of America all right, title, interest, and claim to the premises hereinafter particularly described, and do further certify that the same have never been pledged, sold, or otherwise incumbered.

(Here follow the descriptions of lands embraced in the three lists hereinbefore mentioned, to wit: First, lands within the six-miles clear limits of the railroad from Marquette to the Wisconsin State line, containing 112,145.38 acres; second, list of lands within the six-miles limits of the line of railroad from Ontonagon to the State line and from Marquette to the State line, where they intersect and cross each other, containing 41,649,25 acres; third, list of lands within the six-miles limits of the line of railroad from
269 Ontonagon to the Wisconsin State line, and the Marquette and Ontonagon railroad, where they intersect and cross each other, containing 32,305.93 acres.)

In testimony whereof I have hereunto subscribed my
[SEAL.] name and caused the great seal of the State to be hereunto affixed.

Given under my hand, at Lansing, this first day of May, in the year of our Lord one thousand eight hundred and sixty-eight.

(Signed) HENRY H. CRAPO,
*Governor of Michigan.*

By the Governor:
(Signed) SAMUEL H. ROW,
*Dept. Secretary of State.*

State of Michigan, executive office, Lansing, March 25, 1867.

Plaintiff's counsel also introduced in evidence a letter from James H. Howe, solicitor of the Chicago and Northwestern Railway Com

pany, to the Commissioner of the General Land Office, dated July 9, 1868, of which the following is a copy:

NATIONAL HOTEL,
WASHINGTON, D. C., *July* 9, 1868.

SIR: I have the honor to enclose herewith—

1st. A duly certified copy of a deed executed by the Chicago and Northwestern Railway Company to the State of Michigan, relinquishing all its interest in the lands granted by the act of Congress approved June 3d, 1856, granting lands to aid in the construction of R. R. from Marquette to the Wis. State line, as required by joint resolution of the Congress of the U. States approved July 5, 1862.

270 The original deed was delivered to the executive of that State, and the inclosed is certified to be a correct copy by secretary of state.

There is endorsed upon it copies of the certificates of the proper county officers of Michigan, showing the lands to be free from all incumbrances.

The recitals in the deed show in what manner the C. & N. W. R. Co. obtained title to that grant.

2d. A similar deed of the same premises executed by the Governor of Michigan to the U. S. of America, with the certificates required by the said joint resolution of 1862.

Trusting these conveyances will be sufficient and satisfactory, I am, very respectfully your ob't serv't,

JAMES H. HOWE,
*Solicitor of Co.*

Hon. Jos. S. Wilson, Commissioner G. L. O., Washington, D. C.

Also a letter from the Commissioner of the General Land Office to James H. Howe, solicitor, etc., of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 13, 1868.

SIR: The office has examined the certified copy of deed of release, filed by you on the 9th instant, of lands formerly conveyed to the State of Michigan under the act of June 3, 1856, to aid in the construction of the Marquette and Wisconsin State Line railroad, and finds the same duly executed by the State and company,

271 descriptive of the tracts for that portion of the branch line from Wisconsin State line to Marquette, in conformity with joint resolution of July 5, 1862, Statutes 12, p. 620, and our letter to the Governor of the State of May 15, 1867.

I have to invite your attention to a list of lands, embracing 142,430.23 acres, certified to the State December 21, 1861, for the branch line to Ontonagon, which are omitted in the aforesaid release. The State and railroad company are requested to execute a similar

release for said lands, which will complete the whole matter for both branches.

Respectfully your obedient servant,

JAMES S. WILSON,
*Commissioner.*

James H. Howe, Esq., solicitor for Chigago and Northwestern Railroad Company, National Hotel, Washington, D. C.

Also a letter from said James H. Howe to the Commissioner of the General Land Office, of which the following is a copy:

CHICAGO, *April* 19, 1870.

Hon. Jos. S. Wilson, Commissioner of the General Land Office, Washington, D. C.

DEAR SIR: Will you furnish this company with the list of lands reserved by your office for the grant of 1856 for the State Line and Ontonagon R. R. in Michigan? I understand that the Secretary of the Interior does not approve of the selections made by this company for the construction of the R. R. from Escanaba, Mich., to Negaunee (the lists which have been in your office for the
272 past year), because this company or the State have not released their interests in that old grant between the State line and Ontonagon. If I am correct in this, and can obtain the lists from your office, we will at once execute the necessary release and renew our application for the lands selected.

I will at once forward any fees upon learning their amounts.

I am, resp'ly your ob't serv't,

JAMES H. HOWE,
*Solicitor for Co.*

Also two letters from the Commissioner of the General Land Office to said James H. Howe, of which the following are copies:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 25, 1870.

James H. Howe, Esq., solicitor for Chicago & N. W. R'y Co., Chicago, Ill.

SIR: I acknowledge receipt of your letter of the 19th inst., and say that copy of railroad list therein requested will be prepared and forwarded at the earliest day practicable, together with a memorandum of the fees required by law to be paid into the U. S. Treasury.

Very respectfully, JOS. S. WILSON,
*Commissioner.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

James H. Howe, Esq., solicitor Chicago & N. W. R'y Co., Chicago, Ill.:

Pursuant to your letter of the 19th ult., which receipt was
273 acknowledged on the 25th, I transmit herewith copies of certified transcript of lands to the State of Michigan, embracing

142,430.23 acres for the branch line of the Chicago, St. Paul and Fond du Lac railroad to Ontonagon, in said State, under act June 3, 1856.

The assessed fees according to law amount to $10, which you will please remit, and upon receipt will be paid into the U. S. Treasury.

Very respectfully, JOS. S. WILSON,
*Commissioner.*

Plaintiff's counsel further introduced in evidence a release from the Chicago & Northwestern Railway Company to the State of Michigan, dated June 17th, 1870, of which the following is a copy:

Whereas by act of Congress of the United States, approved on the third day of June, A. D. 1856, entitled "A bill making a grant of lands to the State of Michigan in alternate sections to aid in the construction of railroads in said State," every alternate section of land designated by odd numbers for six sections in width on each side of said roads was granted to said State of Michigan to aid in the construction of railroads from Marquette to the Wisconsin State line;

And whereas by a joint resolution of the Congress of the United States relative to a certain grant of lands for railroad purposes made to the State of Michigan in eighteen hundred and fifty-six, approved on the fifth day of July, eighteen hundred and sixty-two, the words "Wisconsin State line," in the first aforesaid act of Congress, were authorized to be so construed as to authorize the location of the line of railroad therein provided for from Marquette to said State line upon any eligible route from the township of Marquette aforesaid to a point on the Wisconsin State line near the
274 Menominee river, and touching at favorable points on Green Bay and the line of railroad as then located in pursuance of said act from Marquette aforesaid to said Wisconsin State line, according to records of the General Land Office, was authorized to be changed so as to conform to the route in said act indicated as aforesaid;

And whereas it was further provided in said joint resolution that upon the filing in the General Land Office of the lists of said railroad lands, in whole or in part, as now selected and certified in the General Land Office, with the certificate of the Governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claim to the lands as aforesaid set forth and described in the lists thereof thus certified, and that the same have never been pledged or sold or otherwise incumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of land, selected in like manner upon the new line of road as thus surrendered upon the first line, and to the extent of six sections per mile in the aggregate for every mile of the new line, according to the general provisions of the act of June third, eighteen hundred and fifty-six, making it the duty of the Commissioner of the General Land Office to reoffer for public sale in the usual manner the lands aforesaid when duly filed in his office as herein directed;

And whereas the lands granted said State as aforesaid were granted

by said State of Michigan to the Peninsula Railroad Company by the act approved the eighteenth day of March, A. D. 1863;

And whereas said last-named railroad company consolidated with the Chicago and Northwestern Railway Company, a corporation of the said States of Michigan, Wisconsin, and Illinois,
275 which last-named company is possessed of all the rights, privileges, and property of the said Peninsula Railroad Company;

And whereas by an act of Congress of the United States entitled "An act to extend the time for the completion of certain railroads to which land grants have been made in the States of Michigan and Wisconsin," approved on the third day of March, A. D. 1865, there was granted to the State of Michigan for the purpose of aiding in the construction of a railroad from Marquette, on Lake Superior, to the Wisconsin State line at or near the mouth of the Menominee river, for the benefit and use of the Chicago and Northwestern Railway Company, four additional alternate sections per mile to that already granted by the said act of Congress approved June third, 1856, and joint resolution supplementary thereto, said lands to be selected within twenty miles of said road;

And whereas lists of said railroad lands granted by said act of 1856 to aid in the construction of said railroad from Marquette to the Wisconsin State line as the same was originally located have been filed in the General Land Office:

Now, therefore, the said Chicago and Northwestern Railway Company, in consideration of the premises, do hereby remise, release, and forever quitclaim unto the said State of Michigan and its assigns forever all the right, title, and interest it now has or ever had in and to the following pieces or parcels of land situated, lying, and being in the said State of Michigan and conveyed and certified to said State in accordance with the several acts of Congress hereinbefore specifically referred to—that is to say.

(Here follows a list of lands hereinbefore mentioned, being
276 the lands within the six miles clear limits of the line of railroad from Ontonagon to the Wisconsin State line, containing 142,430.25 acres, among which are the lands involved in these suits.)

And the said Chicago and Northwestern Railway Company do hereby covenant and agree to and with the State aforesaid that the lands above described and released hereby have never been pledged, sold, or in anywise incumbered, either by the said Peninsula Railroad Company or by itself.

In testimony whereof the said Chicago and Northwestern Railway Company have hereunto affixed the corporate seal of the
[SEAL.] said company and caused these presents to be signed by their president and attested by their assistant secretary this 17th day of June, A. D. 1870.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
By H. R. PIERSON, *Vice-President.*

Attest: J. A. REDFIELD, *Ass't Sec'y.*

Signed, sealed, and delivered in presence of—
JAMES H. HOWE.
GEO. E. FARWELL.

Said deed was duly acknowledged.

Plaintiff's counsel further introduced in evidence a communication of the attorney general of the State of Michigan to the Governor of said State, dated February 20, 1870, of which the following is a copy:

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
KALAMAZOO, *February 10th*, 1870.

Hon. H. P. Baldwin, Governor, etc.

DEAR SIR: Your favor and inclosures of the 8th inst. are
277 just received. I have examined the acts of Congress in relation to the question presented and find that by act of June 3, 1856, U. S. Stat. at Large, 21, a grant of land was made to construct a road from Ontonagon to the Wisconsin State line. This grant was accepted by the State in 1857 (Laws of —, 347) and conferred upon a company therein named. Of course, the lands were selected and platted as directed by Congress. You will see by referring to act of Congress, July 5, 1862, U. S. Stat. at Large, 620, that Congress gave a construction to the words "Wisconsin State line," as found in the act of June 3, 1856, and provided for a change of route of said road as then located. The lands selected not within six miles of the new line were to revert to the United States. By section five the Governor of Michigan, after receiving a list of the lands not within the six miles of the new route is to certify to certain things therein specified. Joint resolution No. 6, Laws of 1867, recites these former acts and authorizes the Governor to execute the release, etc. This joint resolution assumes that the route has been changed, "and in fact has been made," and that the R. R. Co. has executed a release to the Governor.

On looking over the papers sent to you by Mr. Campbell I do not discover any error in it. It seems to be just what the law contemplates. Of course, I know nothing about the description of the lands therein given, but presume they are correct, as he is the proper officer to make and certify to them. If any of them should prove incorrect I don't see how it could affect the State. In such case your certificate would be a simple nullity, as being unauthorized by law. I cannot see the force of the suggestions of the deputy secretary of
278 state, for it is no matter whether this is a part of the original line or not. The Legislature of 1867 determined that question. 2d. The release should only cover those lands not within six miles of the new route. 3d. I think joint resolution No. 16 gives all the authority needed.

The R. R. Co. certainly has no interest in any land not within the six miles of its new route, and it seems that it has released its interest to all lands beyond that distance.

I therefore advise that, in my judgment, the inclosed release is a proper one for execution by you.

Yours respectfully, DWIGHT MAY,
*Attorney General.*

Plaintiff's counsel also introduced in evidence a release from the Governor of the State of Michigan to the United States, dated August 14th, 1870, of which the following is a copy:

Whereas by act of Congress of the United States, approved on the third day of June, A. D. 1856, entitled "A bill making a grant of lands to the State of Michigan in alternate sections to aid in the construction of railroads in said State," every alternate section of lands designated by odd numbers for six sections in width on each side railroads was granted to said State of Michigan to aid in the construction of railroads from Marquette to the Wisconsin State line;

And whereas by a joint resolution of the Congress of the United States relative to a certain grant of land for railroad purposes made to the State of Michigan in eighteen hundred and fifty-six, approved on the fifth day of July, eighteen hundred and sixty-two, the words "Wisconsin State line" in the aforesaid act of Congress *was* authorized to be so construed as to authorize the location of the
279 line of railroad therein provided for from Marquette to said State line upon any eligible route from the township of Marquette aforesaid to a point on the Wisconsin State line near the mouth of the Menominee river, and touching at favorable points on Green Bay, and the line of railroad as then located in pursuance of said act from Marquette aforesaid to said Wisconsin State line, according to records of the General Land Office, was authorized to be changed so as to conform to the route in said act indicated as aforesaid;

And whereas it was further provided in said joint resolution that upon the filing in the General Land Office of the lists of the railroad lands in whole or in part as now selected and certified in the General Land Office with the certificate of the Governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claims to the lands as aforesaid set forth and described in the lists thereof thus certified, and that the same have never been pledged or sold or in anywise incumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of lands selected in like manner upon the new line of road as thus surrendered upon the first line, and to the extent of six sections per mile in the aggregate for every mile of the new line according to the general provisions of the act of June third, eighteen hundred and fifty-six, making it the duty of the Commissioner of the General Land Office to reoffer for public sale in the usual manner the lands aforesaid when duly filed in his office as herein directed;

And whereas the lands granted to said State as aforesaid were granted by the said State of Michigan to the Peninsula Railroad Company by act approved on the eighteenth day of March, A. D. 1863;

280 And whereas the last-named railroad company consolidated with the Chicago and Northwestern Railway Company, a corporation of the said States of Michigan, Wisconsin, and Illinois, which last-named company is possessed of all the rights, privileges, and property of the said Peninsula Railroad Company;

And whereas by an act of the Congress of the United States entitled "An act to extend the time for the completion of certain railroads to which land grants have been made in the States of Michigan and Wisconsin," approved on the third day of March, A. D. 1865, there was granted to the State of Michigan for the purpose of aiding in the construction of a railroad from Marquette, on Lake Superior, to the Wisconsin State line at or near the mouth of the Menominee river for the benefit and use of the Chicago and Northwestern Railway Company four additional alternate sections per mile to that already granted by the said act of Congress approved June 3d, 1856, and joint resolution supplementary thereto, said lands to be selected within twenty miles of said road;

And whereas lists of said railroad lands granted by said act of 1856 to aid in the construction of said railroad from Marquette to the Wisconsin State line, as the same was originally located, have been filed in the General Land Office;

And whereas the said Chicago and Northwestern Railway Company has released and surrendered all its claims to the premises hereinafter described to the said State of Michigan, as required by the aforesaid joint resolution approved July fifth, A. D. 1862:

Now, therefore, I, Henry P. Baldwin, Governor of the State of Michigan, by virtue of the statute of said State in this case provided, do hereby certify that the said State of Michigan and its assigns have, and do hereby, surrender and release to the

281 United States of America all right, title, interest, and claim to the premises hereinafter particularly described, and do further certify that the same have never been pledged, sold, or otherwise incumbered.

It is intended to release only such lands as are included in the aforesaid acts of Congress and such as are released to the State of Michigan by the aforesaid railroad company.

(Here follows the list of lands hereinbefore mentioned, being the lands within the six-mile clear limits of the line of the aforesaid railroad from Ontonagon to the Wisconsin State line, containing 143,430.23 acres, among which are the lands involved in these suits.)

In testimony whereof I have hereunto subscribed my name and caused the great seal of the State to be hereunto affixed.

Seal of the State of Michigan.

Given under my hand, at Lansing, this fourteenth day of August, in the year of our Lord one thousand eight hundred and seventy.

HENRY P. BALDWIN.

By the Governor:
SAM'L H. ROW,
*Dept. Sec. of State.*

Plaintiff's counsel asked counsel for defendant to admit that the release made by the Peninsula Railroad Company May 16th, 1863, hereinbefore mentioned, was the release referred to in the preamble of the joint resolution of the Legislature of the State of Michigan approved February 21st. 1867, which they declined to do. Defendant's counsel then proposed to send for a witness to show a careful search in the proper offices for any other release made prior to the date of said joint resolution.

By the COURT: It would seem, in the absence of any proof of any other release and with the proof that the Chicago & Northwestern was the successor by consolidation of the Peninsula Company, that this resolution of the Legislature of Michigan would have to be construed as referring to that release by the Peninsula Railroad Company, and we should be obliged to say that it was a misrecital, but still, with all these circumstances before us, we must assume that that was the one that was meant.

Judge DILLON: I am willing to let it rest on the basis that the court puts it. We are at liberty to produce such a paper if it exists, and the other side, if they can find it.

The COURT: The case is so much a question of law that perhaps no injustice would be done if we should leave that question open to be supplemented by proof on that point on either side.

Judge MARSTON: If any important document is omitted by either party that they have the right to add it to this record in making up the bill of exceptions.

(The foregoing colloquy between counsel and the court is inserted in the bill of exceptions under protest of defendant's counsel.) Plaintiff's counsel further introduced in evidence two letters from the Commissioner of the General Land Office to Horace J.
282 Frost, dated January 18th and 19th, 1881, of which the following are copies:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January 18th*, 1881.

Horace J. Frost, Esq., Washington, D. C.

SIR: I am in receipt of your letter of this date asking to be advised of the number of acres relinquished by the Governor of Michigan May 1, 1868, and August 14, 1870, on the branch railroads, viz., Marquette State Line and Ontonagon State Line.

In reply I state the following:

| | |
|---|---|
| List No. 18, branches of Ontonagon State Line, containing | 142,420.23 acres. |
| List No. 19, branch of Marquette State Line, containing | 111,505.38 acres. |
| State Line and branch of Ontonagon State Line, containing | 41,649.25 acres. |
| | 295,584.36 acres. |

| | |
|---|---|
| List No. 21, branch of Marquette State Line and the Marquette and Ontonagon railroad | 36,343.77 |
| Equal moiety | 18,171.88 acres. |
| Branch of Ontonagon and State Line and the Marquette and Ontonagon R. R., 32,296.65, equal moiety | 16,148.32 acres. |
| List No. 22, Bay de Noquet & Marquette & branch of Marquette State Line, 5,145.36, equal moiety | 2,572.68 acres. |
| List No. 23, Bay de Noquet & Marquette, branch of Marquette State Line, and Marquette & Ontonagon railroad (three roads), 22,997.58, equal moiety | 7,665,86 acres. |
| 96,783.36, equal moiety | 44,558.74 |
| Brought forward | 295,584.86 |
| Total | 340,143.60 |

Very respectfully, J. A. WILLIAMSON,
*Commissioner.*

283 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 19, 1881.

Horace J. Frost, Esq., agent for L. S. Ship Canal Railway Improvement Company, Washington, D. C.

SIR: I am in receipt of your letter of 17th inst. requesting to be advised of the number of acres certified under the "joint resolution" of Congress of July 5, 1862, and the acts of March 3, 1865, to the State of Michigan for the Chicago and Northwestern Railway Company.

In reply I have to state the following:

| List No. | Resolution of July 5, 1862. | | Act March 3, 1865. | Date when certified. |
|---|---|---|---|---|
| | Six-mile limits. | Fifteen-mile limits. | Twenty-mile limits. | |
| | *Acres.* | *Acres.* | *Acres.* | |
| 1 | 47,835.84 | | | April 8, 1871. |
| 2 | | 62,824.88 | | " " " |
| 3 | 61,747.84 | | | November 10, 1873. |
| 4 | | 96,585.54 | | " " " |
| 5 | | | 69,826.34 | " " " |
| 6 | | 36,117.01 | 20,764.46 | " " " |
| 7 | 82,978.59 | | | December 2, 1873. |
| 8 | | | 36,636.25 | " " " |
| 9 | 274.50 | | | October 22, 1875. |
| 10 | | 1,241.69 | 195.21 | " " " |
| 11 | 400.00 | | | November 18, 1875. |
| 12 | | 400.00 | 40.00 | " " " |
| 13 | 46.00 | | | June 13, 1880. |
| | 193,282.77 | 197,169.12 | 127,462.26 | |
| | | 193,282.77 | | |
| Resolution July 5, '62 | | 390,451.89 | | |
| Act March 3, 1865 | | 127,462.26 | | |
| Total | | 517,914.15 | | |

The lands stated as above certified lie on the line of said railroad as constructed from Marquette to the mouth of the Menominee river, one hundred and twenty-four miles. The numbers of
284 acres released on the branch of Marquette State Line (74 miles, estimated) and branch of Octonagon State Line (66 miles, estimated) are given in my letter of yesterday.

Very respectfully, J. A. WILLIAMSON,
*Commissioner.*

Plaintiff's counsel also introduced in evidence a copy of a bill introduced in the Senate of the United States January 10, 1881, being Senate bill 1997, and the bill referred to in the report of the Committee on Public Lands, introduced in evidence by defendants' counsel.

The following is a copy of said bill:

A bill to quiet the title to certain lands in the Upper Peninsula of Michigan.

Whereas by an act of Congress entitled "An act making a grant of alternate sections of public lands to the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes," approved June third, eighteen hundred and fifty-six, there was granted to the State of Michigan certain lands to aid in the construction of a railroad from Ontonagon to the Wisconsin

State line, and it was provided by said act that if said road should not be completed within ten years said lands should revert to the United States; and

Whereas by an act of the Legislature of said State said lands were disposed of to the Ontonagon and State Line Railroad Company; and

Whereas more than twenty-four years have elapsed since the passage of said act of Congress, and no part of said road has been constructed, and the successors of said Ontonagon and State Line Railroad Company did release said lands to said State, and the Governor of said State, on the fourteenth day of August,
285 eighteen hundred and seventy, executed a deed in the name and under the seal of said State purporting to release said lands to the United States, and the proper officers of the United States have granted and issued patents and certificates for a large portion of said lands to purchasers and pre-emptors thereof and settlers thereon in good faith and to certain corporations to whom lands have been granted by the United States in aid of the construction of public works, whose claims and titles thereto have long been acquiesced in:

Therefore be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the rights and title of all parties holding patents or claiming title under certificates issued by the Commissioner of the General Land Office or under certificates of entry issued by the register and the receiver of any local land office, or who have made homestead entries and settlements or pre-emption claims of and upon any of the lands within the limits of said Ontonagon and State Line Railroad Company grant and in conflict therewith or affected thereby, shall be, and hereby are, confirmed and protected in the same manner and to the same extent as though no reservation of lands had ever been made.

That all patents, homestead entries, settlements, pre-emption claims, lists of lands certified by the Commissioner of the General Land Office, and certificates of entry issued by the register and the receiver of the Marquette land office prior to November first, eighteen hundred and eighty, of or upon any lands granted to the State of Michigan to aid in the construction of a railroad from Ontonagon to the Wisconsin State line or within the ulterior limits pre-
286 scribed for selections of any lands so granted by the act of Congress entitled "An act making a grant of alternate sections of the public lands to the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes," approved June 3d, eighteen hundred and fifty-six, and in conflict or inconsistent with said grant or anything in said act relating to said lands, are hereby confirmed to the same extent and shall have the same validity, force, and effect as though said grant had not been made or said act had not been passed, and that all the right, title, and claim of the State of Michigan in and to said lands are hereby declared to be forfeited.

SEC. 2. That the residue of the lands granted to the State of Mich-

igan by said act to aid in the construction of a railroad from Ontonagon to the Wisconsin State line not heretofore granted or disposed of by the United States to other parties, or whereto titles of other parties are not confirmed or recognized by the preceding section, is hereby granted to the State of Michigan, to be hereafter disposed of by said State, to aid in the construction of a railroad in said State between said mentioned points, but upon and subject to the same conditions and restrictions made and contained in said act of Congress approved June third, eighteen hundred and fifty-six, except that the time for the construction and completion of said railroad is hereby extended five years from the passage of this act.

Plaintiff's counsel also introduced a copy, duly certified from the General Land Office, of the map of survey of the Chicago, St. Paul and Fond du Lac railroad from Fond du Lac, Wisconsin, northerly to the State line, meeting the Michigan line thereof, together with the certificates endorsed on said map, copy of said map, with the certificates endorsed thereon, is hereto annexed, marked Exhibit B.

287 Plaintiff's counsel also introduced in evidence a letter from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated May 2, 1866, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *May* 2, 1866.

Register and receiver, Marquette, Mich.

GENTLEMEN: Referring to your letter of the 7th February last, in reference to the agent of the Northwestern railroad wishing to file a partial list of selections along the line of the railroad from Marquette to the Wisconsin State line, I have to state that your action declining to receive and file such list is approved.

Although the lands have been withdrawn from sale along the new line of road, we do not regard the State as having any legal claim to the lands granted until the terms of the joint resolution of July 5, 1862, shall be complied with by a formal relinquishment to the United States of the lands along its old line.

Until notified by this office that such relinquishment has been made by the State of Michigan, you will refuse all applications to file lists of lands along the new line.

Very respectfully, J. M. EDMUNDS,
*Commissioner.*

Also a letter from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated December 6th, 1869, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, *December 6th*, 1869.

Register and register, Marquette, Michigan.

GENTLEMEN: Pursuant to the register's letter of the 28th Oc-

288 tober last, which receipt was acknowledged 11 ultimo, I herewith transmit a diagram indicating the six miles limits as fixed by the act 3 June, 1856, of the Chicago, St. Paul and Fond du Lac branch lines to Marquette and Ontonagon, Michigan. The same is to govern you in matter — allowing the agent of the Portage Lake and Lake Superior Ship Canal Company to complete his selections.

In regard to the branch line to Marquette, I state that the lands heretofore certified by the Department have been duly released by the State and railroad company, which release was filed 9th July, 1868; and, further, that the lands certified for the branch line to Ontonagon have not as yet been released. It will therefore be necessary for the State and railroad company to file a complete release descriptive of the tracts along said branch road before the selections are made by the canal company along said line.

I have also caused to be laid down on said diagram the six-mile limits of the Marquette and Ontonagon railroad, whereby the odd sections are reserved for said road and the even sections rated at $2.50.

Very respectfully, JOS. S. WILSON,
*Commissioner.*

Also a letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated August 8th, 1874, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Aug.* 8, 1874.

Hon. C. Delano, Secretary of the Interior.

SIR: I have the honor to state, in reply to your referred letter of the Governor of Michigan of the 25th ultimo, that under the acts of March 3, 1865, and July 3, 1866, granting lands to aid in the
289 construction of the Portage Lake and Lake Superior ship canal, title has vested in the State by eight approved transcripts, embracing in the aggregate 394,444.40 acres.

The Governor's letter and wrapper are herewith returned.

I am, very respectfully, S. S. BURDETT,
*Commissioner.*

Also a letter from the Secretary of the Interior to the Governor of the State of Michigan, dated August 15, 1874, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *August* 15, 1874.

SIR: In answer to your inquiry contained in your letter of the 25th ultimo, I have the honor to state that the Commissioner of the General Land Office informs me that the lands to aid in the construction of the Portage Lake and Lake Superior ship canal have

been approved to the State of Michigan, amounting to 394,444.40 acres.

Very respectfully,

B. R. COWAN,
*Acting Secretary.*

To his excellency John J. Bagley, Governor of Michigan, Detroit, Michigan.

Also a letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated February 4, 1878, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *February* 4, 1878.

Hon. C. Schurz, Secretary of the Interior.

SIR: I have the honor to submit herewith for approval list No. 9 of the Portage Lake and Lake Superior ship canal
290 lands, embracing 5,628.00 acres in the Marquette district, Michigan, which are found to inure to the State under the acts of March 3, 1865, and July 3, 1866, to aid in the building of said canal. The list, when approved by the honorable Secretary of the Interior, will make up the full quantity of 400,000 acres granted by said acts.

I am, sir, very respectfully,

J. A. WILLIAMSON,
*Commissioner.*

Also a communication from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated March 19, 1888, of which the following is a copy, so far as material to this case:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 19, 1888.

Register and receiver, Marquette, Mich.

GENTLEMEN: By decision of September 29, 1887, in the case of Wakefield *vs.* Cutler, Frank, and Laydon, involving an odd-numbered section within the common six miles limits of the grant for the Ontonogan and State Line and the Marquette & State Line Railroad Companies, this office held that the odd-numbered sections in said limits were not subject to private cash entry; that any right the State might have had to such lands (by reason of the grant to the State for the railroads aforesaid) had been waived by its reconveyance to the United States, and that the same were subject to preemption and homestead entry. I have before me a large number of applications to apply for and enter odd-numbered sections within said limits which have been transmitted to this office on appeal from your action rejecting the same at various times during
291 and since the year 1881, and upon which action has been suspended in this office pending the decision of the question

as to whether or not such lands were subject to entry under the settlement laws.

The applications referred to are of lands which are clear of claims of record in this office, and there being no conflicting claims (except as the applications conflict with each other), and it having been held as aforesaid that the State had waived any claim it may have to the lands, I see no reason for further suspension of action upon said applications, which are accordingly returned for allowance as to the odd sections as of the date of their presentation, all conflicts between same being left for adjudication at the proper time—*i. e.*, upon offering the final proof or upon contest properly initiated.

The names of the parties whose applications are returned herewith and the descriptions of land applied for are as follows:

(Here follow descriptions of entries running through the years 1882, 1883, 1884, 1885, 1886, 1887, and in 1888—in all, 155 entries.)

You will advise the parties hereof, and allow 30 days within which to complete their filing and entries. Those applications to enter lands in said limits which are covered by claims of record will be considered and action taken thereon at the earliest possible date.

Respectfully, S. M. STOCKSLAGER,
*Commissioner.*

Also a letter from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated July 16, 1880, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 16, 1880.

Register and receiver, Marquette, Mich.

GENTLEMEN: Cash entry No. 10652, made April 14, 1880, 292 by George M. Wakefield, covering the N. W. $\frac{1}{4}$, the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, and lots 2, 3, 4, and 5, and the W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 5, T. 42 N., R. 35 W., is suspended. The area given in the papers and in the abstract is $372\frac{28}{100}$ acres. By the plat on file in the office the area of the above tracts *are* shown to be as follows: N. W. $\frac{1}{4}$, 160 acres; N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, 40 acres, lot 2, $24\frac{10}{100}$; lot 3, $54\frac{58}{100}$; lot 4, 39; lot 5, $54\frac{60}{100}$, and W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, 80 acres—a total of $452\frac{28}{100}$ acres.

You will call upon Mr. Wakefield to pay for eighty acres of land (the difference between the area given in the papers and that shown in the plat), for which the receiver will issue a supplemental receipt, and transmit the same to this office with your regular returns.

Very respectfully, J. A. WILLIAMSON,
*Commissioner.*

Also a letter from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated August 11, 1880, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 11, 1880.

Register and receiver, Marquette, Mich.

GENTLEMEN: In list "A" of selections for the Portage Lake and Lake Superior ship canal, held for cancellation by my letter "F" of 7th March, 1879, and canceled by letter of 17th January, 1880, the N. E. ¼ of S. W. ¼, sec. 15, T. 45 N., R. 35 W., Mich., was inadvertently included. Said tract was again selected and approved for said canal company, per list 4 of selections, approved 22d May, 1871, and you will note a correction of said cancellation opposite
293 said tract, with a reference to this letter, and also advise J. M. Longyear, Esq., the agent of said company, of this action.

Respectfully, J. A. WILLIAMSON,
*Commissioner.*

Also a letter from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated March 25, 1890, of which the following is a copy, omitting all names of claimants and descriptions of lands except that of Walter A. Cunningham, the defendant in this suit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 25, 1890.

Register and receiver, Marquette, Mich.

GENTLEMEN: The honorable Secretary of the Interior having, on the 7th inst., affirmed office decision of September 11, 1888, wherein the application of the following-named parties to enter the tracts of land opposite their names were rejected for the reason that the same had previously been approved for the Portage Lake and Lake Superior Ship Canal Company, I have to advise you that the claims of said parties to the tracts hereinafter described will stand rejected and the case is closed:

* * * * * * *

W. A. Cunningham, S. W. ¼, sec. 25, T. 44 N., R. 36.

* * * * * * *

Inclosed herewith you will please find a copy of the honorable Secretary's decision. Notify the parties in interest hereof.

Very respectfully, LEWIS A. GROFF,
*Commissioner.*

294 Also a copy of the decision of the Secretary of the Interior, referred to and inclosed in the last-mentioned letter, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 7, 1890.

JAMES ENRIGHT *et al.*
*vs.*
P. L. & L. S. S. C. Co.

The Commissioner of the General Land Office.

SIR: I have considered the separate appeals of James Enright *et al.* from the decision of your office of September 11, 1888, affirming the action of the local office rejecting the applications of Enright and others, appellants named therein, to enter certain tracts of land in the Marquette, Michigan, land district, respectively, as shown by your said decision.

Their applications were rejected for the reason that the lands applied for had previously been approved for the Portage Lake and Lake Superior Ship Canal Company under the grant of March 3, 1865 (13 Stats., 519). From this action the several applicants filed their separate appeals, alleging that "your records show the fact that at the date of said selection and approval that said land was reserved for railroad purposes and not subject to said selection. Said selection having been made contrary to law is void, and the said railroad grant having since lapsed by limitation of law the land is therefore forfeited to the United States, and thus, being U. S. land, is subject to my said application."

The question raised by this appeal is whether the canal company had the right to make selections under the limits of a railroad grant, but as the lands have been approved to the State for the benefit of said company the Department has no jurisdiction to deter-
295 mine the question. Your decision is affirmed and the papers herewith returned.

Very respectfully, JOHN W. NOBLE, *Secretary.*
G. C.

Also a communication from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated September 11, 1888, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept.* 11, 1888.

Register and receiver, Marquette, Mich.

GENTLEMEN: I am in receipt of your letters of various dates, transmitting on appeal the applications of the parties hereinafter named to file for and enter lands in your district, which applications were rejected by you for the reason that the lands applied for had been previously approved for the Portage Lake and Lake Superior Ship Canal Company. The records of this office show the tracts in question to have been approved for said company on the dates specified in the appropriate column. Under the well-established ruling of this Department its jurisdiction over said lands ceased with such

approval. Your decisions in said cases are therefor affirmed, and said applications are accordingly rejected, subject to appeal within sixty days.

The names of the applicants, the descriptions of the tracts applied for, the dates of approval of same for said company, and the dates of your letters transmitting said applications are as follows, to wit:

296 (Here follows a list of about one hundred applications, among which is that of the defendant Walter A. Cunningham.)

You will advise the parties in interest hereof and make prompt report at the expiration of the time allowed for appeal.

Respectfully, S. M. STOCKSLAGER,
*Commissioner.*

Plaintiff's counsel offered in evidence the files and records of this court in the case formerly pending therein, in equity, wherein The Lake Superior Ship Canal, Railway and Iron Company was complainant and the Ontonagon and Brule River Railroad Company was defendant, commenced by bill filed June 21st, 1881, whereby the said plaintiff, as such complainant, set forth the several acts and proceedings by which it became the owner of the lands so certified to the State of Michigan as inuring to the benefit of the Portage Lake and Lake Superior Ship Canal Company under said act of Congress of July 3rd, 1866, and situated within the six-miles limits of said surveyed railroad line from Ontonagon to the Wisconsin State line, as herein set forth, and the claim asserted thereto by said Ontonagon and Brule River Railroad Company, and prayed that said Ontonagon and Brule River Railroad Company be restrained and enjoined from selecting or receiving from the State a patent for any of said lands as claimed by the said complainant, and from making any sales or contracts to sell any of said lands, and from incumbering the same, and for a decree quieting the title of said complainant to said lands as against said Ontonagon and Brule River Railroad Company, and that said railroad company should be forever enjoined from setting up any right or title thereto as against said complainant; which record further showed that said cross-bill was dismissed by decree of the court on hearing,
297 on demurrer thereto filed by complainant, and said complainant's bill was voluntarily dismissed by it, by leave of the court, without prejudice, November 28th, 1883.

Defendant's counsel objected thereto as irrelevant to the issues in these causes, and the court sustained said objection and excluded said evidence, to which ruling plaintiff's counsel excepted.

Plaintiff's counsel also introduced in evidence a communication from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated September 29, 1887, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September* 29, 1887.

Register and receiver, Marquette, Mich.

GENTLEMEN: Under date of the 3d ult. Messrs. Britton & Gray, of this city, attorneys for Geo. M. Wakefield, asked the issuance of patent on private entry No. 10569, covering the W. ½ W. ½ sec. 11, W. ½ W. ½ and E. ½ E. ½ sec. 14, T. 42 N., R. 35 W., Mich., made by said Wakefield April 15, 1880.

The question presented by Mr. Wakefield's entry is whether the odd-numbered sections in the common six-mile limits of the grant for the Ontonagon and State Line and the Marquette and State Line railroads were subject to private cash entry at the time Mr. Wakefield so entered, and involves the legal status of a large number of private entries and locations within said limits.

The liability to private entry and location of the even-numbered sections in said limits as affected by the 4th section of the
298 joint resolution of July 5, 1862 (12 Stat., 620), was considered by the Department in the case of Pecard *vs.* Camens *et al.*, the question therein presented being whether where lands have been once offered, then increased in price and again offered, and while in that condition declared by Congress to be subject to sale at the first price and private entries were allowed therefor without further offering, such entries were void for want of restoration notice.

The Hon. Secretary held in that case, by a decision of Sept. 17, 1885 (4 L. D., 152), that such entries were not void, but voidable, and might be confirmed by the board of equitable adjudication.

The status of private entries and locations of odd-numbered sections within said common limits present entirely different questions, and, in order that the same may be fully considered, a statement of the lands up to this time is essential.

In the year 1853 the lands embraced in the townships, the odd-numbered sections of which will be affected by the decision in this case, were offered at public sale at the ordinary minimum price of $1.25 per acre.

By act of June 3, 1856 (11 Stat., 21), Congress made a grant of lands to the State of Michigan to aid in the construction of railroads from Marquette and Ontonagon to the Wisconsin State line.

A withdrawal from sale or location of all lands in the Northern Peninsula of Michigan north of T. 29 N. and west of R. 19 W. for the benefit of said grant was ordered by telegram of May 30 and letter of June 13th, 1856, and under date of Ap'l 27, 1860 (the road from Ontonagon having been located in 1857, and from Marquette in 1858), this office transmitted to the local office diagrams showing the six and 15 mile limits of said roads and directed the restoration of all lands outside of the 15-mile limits of the grant and of
299 the even-numbered sections between the 6 and 15 mile limits thereof.

The grant from Ontonagon was conferred upon the Ontonagon and State Line R. R. Co. and that from Marquette upon the Mar-

quette and State Line R. R. Co. Said companies were subsequently consolidated with the Chicago, St. Paul and Fond du Lac R. R. Co. under the name of the latter.

The rights, franchises, and land grants of the Chicago, St. Paul and Fond du Lac Co. were sold under a mortgage sale June 2, 1859, and on June 6, 1859, a new company, known as the Chicago and Northwestern R'y Co., was organized by the purchasers.

On December 12, 1861, there were certified to the State, for the joint benefit of the Ontonagon and State Line and the Marquette and State Line R. R. Co's, 41,649.25 acres within the conflicting six-mile limits of said roads.

By joint resolution approved July 5, 1862 (12 Stat., 620), it was provided that the words "Wisconsin State line" in the act of June 3, 1856, should be construed to authorize the location of the road from Marquette to the Wisconsin State line upon any eligible route from Marquette to the Wisconsin State line near the mouth of the Menominee river, touching at favorable points on Green Bay, and the State was authorized to surrender to the United States the lands which had been certified for the benefit of said road and receive in lieu thereof a like quantity of lands to be selected along the line as relocated.

The road was relocated from Marquette to the State line at the mouth of the Menominee river under said resolution, and on May
1, 1868, the Governor of the State of Michigan relinquished to
300 the United States the 41,649.25 acres which had been certified as aforesaid for the joint benefit of the Ontonagon and State Line and the Marquette and State Line railroads, as aforesaid, and Chicago and Northwestern R. R. Co. (the successor to said roads, as aforesaid) having previously released to the State its interest in the lands.

The restoration of a portion of the odd-numbered sections in said common limits was ordered by this office May 29, 1873, and notice thereof given by the local office June 27, 1873, to take effect August 6, 1873.

The odd sections now under consideration, however (11, 42, 35), were not included in said order or notice of restoration, township 42 N., range 35 W., being entirely omitted therefrom.

As to those sections where the restoration was ordered and notice given by the local officers it appears the restoration was never carried into effect for the reason that same was suspended by letter of July 30, 1873, the Governor of Michigan having, under date of July 10, 1873, in a letter addressed to the Hon. Secretary of the Interior, claimed that as Congress had never annulled the grant nor the Legislature of Michigan authorized the surrender of the lands along the line of the Ontonagon and State Line R. R. their surrender was made without authority of the law and that they rightfully belonged to the State of Michigan.

From the foregoing it will be seen that the questions presented by the odd sections in what is known as the common limits of the O. & St. L. and the M. & S. L. R. R's differ widely from those pre-

sented by the even sections in said limits as considered in the Pecard *v.* Camens case aforesaid.

301 In the case under consideration the question that arises is the claim of the State to the odd-numbered sections within the common limits of the grant referred to as well as the liability of such sections to private entry and location as affected by the joint resolution of July 5, 1862 (12 Stat., 620), and the fact of the certification of the lands to the State, as aforesaid, and the subsequent relinquishment of the same to the United States.

The 5th section of said joint resolution of July 5, 1862, provides "that upon the filing in the General Land Office of the lists of said railroad lands, in whole or in part, as now selected and certified in the General Land Office, with the certificate of the Governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claim to the lands as aforesaid set forth and described in the lists that are thus certified, and that the same have never been pledged or sold or in anywise incumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of lands, selected in like manner, upon the new line of road as thus surrendered upon the first line; and it shall be the duty of the Commissioner of the General Land Office to reoffer for public sale in the usual manner the lands embraced in the lists of surrendered lands aforesaid when duly filed in his office as herein directed."

Acting under said joint resolution, the Governor of Michigan, on May 1, 1868, as aforesaid, relinquished to the U. S. the 41,649.25 acres of land which had been certified on account of the O. & S. L. and M. & S. L. R. R. Co's, and since that time has received other lands along the new line in lieu thereof.

The claim of the State that there was no authority for the surrender of the lands along the O. & S. L. R. R. and that
302 they rightfully belong to the State will not be considered here in so far as said claim relates to lands not in the limits common to both the O. & S. L. and the M. & S. L. R. R. Cos., but as to the lands in such common limits the joint resolution providing for the surrender of lands in the limits of the M. & S. L. R. R. was sufficient authority for their surrender, and this, coupled with the fact that they were relinquished under said act, and that thereunder other lands have beem selected and certified in lieu of those relinquished, is conclusive as to the rights of the State, which by such relinquishment waived all rights it might have in said lands, and the Department so treated — as to the even sections in the Pecard *vs.* Camens case, referred to, by applying the provisions of the 4th section of the joint resolution (relative to the even sections) to the even sections within the common limits.

Respecting the liability of the odd sections in the common limits of the grant referred to to private entry and location, this case differs from the Pecard *vs.* Camens case, involving the above sections. In that case the question was as hereinbefore stated, while in this case the lands not only were never either reoffered or restored, but since the original offering title to the same has passed entirely out of the United States by the certification aforesaid.

The concluding clause of the 5th section of the joint resolution hereinbefore quoted is as follows: "And it shall be the duty of the Commissioner of the General Land Office to reoffer at public sale in the usual manner lands embraced in the lists of the surrendered lands aforesaid when duly filed in his office as hereinbefore directed."

303 While it is true that such public reoffering has never been made as directed by the statute, it is equally true that by the clause quoted Congress made a public offering of the surrendered lands a condition precedent to the right to dispose of same at private sale by directing that they should be reoffered at public sale; but were this not so I am of opinion that the act of 1820 would operate to make a reoffering at public sale a prerequisite to the right of private entry, for the reason that when this land (the title to which had passed entirely out of the United States by the certification aforesaid) was returned to the U. S. it revested as newly acquired land, and came as completely within the statute of 1820 as it did before the original offering of 1853, and for me to hold that an offering of same at public sale were not a condition precedent to its disposal at private sale would be equivalent to ignoring the act of 1820 and to defeat the object of that act, which was to enhance the price of lands above the minimum under the inspiration of competitive bidding.

Since the United States acquired title to the land in question by the relinquishment of the same to it by the State the land has never been offered at public sale, and hence is not, nor never has been, subject to disposal by private entry, and Mr. Wakefield's entry, having been made for lands not subject to such entry, is therefore held for cancellation, subject to appeal within sixty days.

It appears that by letter of March 8th, 1883, you transmitted on appeal the rejected application of H. Cutler to file D. S. for the W. ½ W. ½ of said sec. 11, and on Dec. 4, 1884, you transmitted on appeal the rejected application of Edward Frank to file D. S. for the same tract, and under date of Jan'y 26, 1885, you transmitted on appeal the rejected application of Chas. Laydon to file D. S. for said tract, all of said applications having been rejected, because the land applied for had been sold to George M. Wakefield April 15, 1880, per cash entry No. 10659 aforesaid.

Should this decision, holding Mr. Wakefield's entry for cancellation become final the respective rights of the pre-emption applicants will then be considered.

The attorneys for all parties in interest will be advised hereof by this office.

Very respectfully, WM. A. J. SPARKS,
*Commissioner.*

Plaintiff's counsel also introduced evidence to show that the lands certified to the Chicago and Northwestern Railway Company along the new line from Marquette to the State line at the mouth of the Menominee river under the joint resolution of Congress approved

July 5, 1862, had been patented by the State of Michigan to the Chicago and Northwestern Railway Company.

Plaintiff's counsel also introduced in evidence a certain list of lands disposed of by the Government at private entry in even-numbered sections and odd-numbered sections within the six-miles limits of the aforesaid line of railroad from Ontonagon to the Wisconsin State line, showing the names of purchasers, date of sale, and date of patent in cases in which patents had been issued from the year 1867 to 1889, both inclusive. Said list of lands showed the number of acres sold and the number of acres patented in each year during said period, as shown by the following table, to wit:

304

| Years. | Acres entered. | | Acres patented. | |
|---|---|---|---|---|
| | Odd sections. | Even sections. | Odd sections. | Even sections. |
| 1867 | | 7,660 | | 160 |
| 1868 | | 1,720 | | 1,800 |
| 1869 | | | | 720 |
| 1870 | | 80 | | 5,280 |
| 1871 | 320 | 880 | | 1,160 |
| 1872 | 9,200 | 8,640 | 7,440 | 5,840 |
| 1873 | 5,800 | 4,080 | 6,120 | 5,720 |
| 1874 | | 400 | 520 | 920 |
| 1875 | 1,160 | 2,120 | 1,080 | 1,760 |
| 1876 | | 240 | 40 | 600 |
| 1877 | 1,160 | 2,560 | | 160 |
| 1878 | 360 | 1,360 | | 120 |
| 1879 | 1,480 | 2,680 | | |
| 1880 | 13,360 | 21,200 | | 6,680 |
| 1881 | 1,560 | 11,360 | 320 | 8,120 |
| 1882 | 560 | 1,600 | 120 | 40 |
| 1883 | | 160 | | 480 |
| 1884 | 80 | | | 240 |
| 1885 | | 160 | 480 | 1,240 |
| 1886 | 2,000 | 120 | | 4,000 |
| 1887 | | 2,440 | | 1,200 |
| 1888 | 9,000 | 3,320 | 80 | 1,280 |
| 1889 | 4,920 | 4,720 | 160 | |
| | 51,600 | 78,820 | 16,360 | 46,680 |

Evidence was further given to show that the lands so certified to the State for the benefit of the Portage Lake and Lake Superior Ship Canal Company, within the six-miles limits of the said line of railroad from Ontonagon to the Wisconsin State line, had been assessed for State, county, township, and other taxes to the plaintiff, and that the plaintiff had paid taxes thereon as follows:

| | | |
|---|---|---|
| For the year | 1880 | $507 38 |
| " " " | 1881 | 589 80 |
| " " " | 1882 | 513 03 |
| " " " | 1883 | 1,443 72 |
| " " " | 1884 | 910 62 |

| | | |
|---|---|---|
| For the year | 1885 | $231 66 |
| " " " | 1886 | 3,578 00 |
| " " " | 1887 | 3,554 24 |
| " " " | 1888 | 5,585 68 |

And also that such taxes had been so assessed on said lands to the plaintiff for the year 1889 and had been paid by it.

305 Defendant's counsel introduced in evidence the following letter:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 9, 1880.

Register & receiver, Marquette, Mich.

GENTLEMEN: The following were inadvertently included in a list of entries submitted to the board of equitable adjudication for confirmation as entries which had been made upon lands reserved only for the Portage Lake & Lake Superior Ship Canal Company and since restored, and in so far as said entries conflict with the reservation for canal purposes they were confirmed by the board on the 24th ult. Upon re-examination it appears that these entries are in conflict with the grant made per act of June 3, 1856, to the State of Michigan in aid of the construction of the railroad from Ontonagon to the Wisconsin State line, known as the Ontonagon & State Line railroad, and also known as the Ontonagon Branch of the Chicago, St. Paul & Fond du Lac railroad. The grant has lapsed, but it has never been declared forfeited by competent authority. The title to said lands is held to be in the State under the grant, and the entries which have been made upon said lands cannot be passed to patent.

The above-mentioned confirmation by the board in these cases does not alter the status of the lands nor suffice to remove the conflict with the grant for the railroad.

The entries which remain suspended are as follows:

* * * * * * *

Respectfully,

C. W. HOLCOMB,
*Acting Commissioner.*

Here follows a list of eleven entries, embracing about 1,500 acres of land, three of which entries were upon lands in the common six-miles limits of the Ontonagon and State Line road, and the remaining eight entries were in the clear six-miles limits of the Ontonagon and State Line road.

Plaintiff's counsel offered evidence to show that each of the tracts of land involved in these causes is worth $6,000 and upwards.

It was admitted on the part of the plaintiff that P. J. Avery, agent of the State of Michigan, was also president of the Portage Lake and Lake Superior Ship Canal Company at the time of the selection of said lands under said granting act of July 3, 1866.

306 The foregoing contains all the evidence introduced by either party upon the trial of the aforesaid causes, and thereupon the plaintiff's counsel requested the said circuit court to instruct the jury in each of said causes as follows:

1. That on the pleadings and evidence in this action the plaintiff is entitled to recover, and you will find a verdict in its favor.

2. The plaintiff claims title and right to recover the possession of the real estate in controversy under the act of Congress of July the 3rd, 1866, entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," and under a certification of the said land to the State of Michigan for the benefit of the Portgage Lake and Lake Superior Ship Canal Company by the Commissioner of the General Land Office, dated May 19th, 1871, being supplemental list No. 4, approved as follows:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON CITY, D. C., 22*d May*, 1871.

"Approved, subject to the conditions and rights above mentioned.
"C. DELANO, *Secretary.*"

The court instructs the jury that inasmuch as the land in question in this suit is embraced in said certification thus approved the same operated to convey the said land to the State of Michigan, and under the said act the said land thus certified inured to the use and benefit of the Portage Lake and Lake Superior Ship Canal Company, whose name was afterwards changed to that of the Lake Superior Ship Canal, Railroad and Iron Company, and as the Governor of the said State, on the 25th day of June, 1875, certified and determined that the said ship canal and harbor mentioned
307 in said act of July 3rd, 1866, and in the Michigan act of March 18th, 1865, entitled "An act to accept a grant of lands by Congress to aid in the construction of the ship canal and harbor at the head of Portage Lake, at its connection with Lake Superior, and to provide for the construction of the same," and the act of March 27th, 1867, accepting the said grant made by the said act of Congress of July the 3rd, 1866, had been constructed by said company, as required by law, and as the plaintiff in this suit has shown that it has succeeded to the title and rights of the said Portage Lake and Lake Superior Ship Canal Company in and to the said land, the plaintiff is entitled to recover the possession thereof in this action from the defendant, and you will accordingly find a verdict for the plaintiff.

3. The supplemental list No. 4 of the said lands introduced in evidence, embracing, among other tracts, the land in question, approved by the Secretary of the Interior on the 22nd day of May, 1871, was as against the said defendant a valid certification of the said lands, and the defendant in this action of ejectment cannot defeat the title and right thus granted to and conferred on the State of Michigan, and through it to the said canal company, by showing that the said lands were improperly selected, certified, and approved to the State of Michigan as aforesaid.

4. Under the said act of Congress of July 3rd, 1866, the grant of lands for the benefit of the said ship canal company was of two hundred thousand acres of land in the Upper Peninsula of the State of Michigan, to be selected from lands to which the right of pre-emption or homestead had not attached, which selection was to be made by an agent or agents appointed by the Governor of the said State, subject to the approval of the Secretary of the Interior,
308 which, when so located, should inure to the use and benefit of the said ship canal company, in accordance with an act of the Legislature of the State of Michigan conferring the lands granted to the said State on the said company under this legislation. It is in proof that the land in question in this suit was selected to fill the said canal grant of July the 3rd, 1866, by an agent appointed by the State of Michigan, and that the said selection was approved by the Secretary of the Interior on the 22nd day of May, 1871, and the list containing the said land and the said approval were duly certified to the State of Michigan for the benefit of the said canal company. This act of July 3rd, 1866, conferred upon the Secretary of the Interior the power to determine what lands were of the description granted by the act of July the 3rd, 1866, and that decision as embodied in the said list embracing the land now in controversy, and approved by the Secretary of the Interior and accordingly certified to the State of Michigan, is conclusive in this action of the rightfulness of the said certification, and had the effect in law to place the title to the lands thus approved and certified to the State of Michigan in the State of Michigan for the benefit of the said canal company.

5. It appearing that under the joint resolution of Congress of July the 5th, 1862, entitled "A joint resolution relative to a certain land grant for railroad purposes made to the State of Michigan in 1856," the Chicago and Northwestern Railway Company (the successor in interest of the Ontonagon and State Line Railroad Company and of the Marquette and State Line Railroad Company, consolidated into the Chicago, St. Paul and Fond du Lac Railroad Company, and the successor in interest of the Chicago, St. Paul and Fond du Lac Railroad Company and of the Peninsula Rail-
Company), by instrument dated the 14th day of June,
309 1870, remised, released, and quitclaimed to the said State of Michigan and its assigns all the right, title, and interest it then had or ever had in and to the lands in controversy, and that afterwards, to wit, on the 14th day of August, 1870, the Governor of the State of Michigan, under the great seal thereof, filed in the General Land Office, at Washington, the lists of the said railroad lands, including the land in controversy in the present action, which had been theretofore selected and certified under the act of Congress of June 3rd, 1856, entitled "An act making a grant of alternate sections of the public lands in the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes," together with a certificate, under the seal of the State, that the State and its assigns surrendered all claim to the said lands set forth and described in the lists thereof, which in-

cluded the land in controversy in this action, and that the same had never been pledged, sold, or otherwise incumbered; and it further appearing that under the said joint resolution of July the 5th, 1862, the State afterwards selected for the new line of railroad mentioned in the said joint resolution of July the 5th lands in quantity greater than the lands thus surrendered, and that the lands so selected were afterwards certified by the United States to the State of Michigan for such new line and were afterwards patented by the said State of Michigan to the said Chicago and Northwestern Railway Company, the court instructs you that said lands thus relinquished and surrendered by the Governor having afterwards been selected under the canal grant of July 3rd, 1866, by an agent appointed by the Governor and afterwards approved by the Secretary of the Interior and certified to the State of Michigan for the benefit of the said canal company, such certification thereof by the
310 Secretary of the Interior was not void.

6. Said supplemental list No. 4 of lands selected by the State of Michigan under the act of Congress of July the 3rd 1866, which was approved May 22nd, 1871, by the Secretary of the Interior, as a portion of the land to aid in the construction of the harbor and ship canal at Portage Lake, Keweenaw Point, to the State for the benefit of the canal company under said act of July 3rd, 1866, is not void on the ground that the title to the said lands thus selected (which included, among other tracts, the one in controversy in this action) was in the State of Michigan under the railroad act of June the 3rd, 1856, for the State by reason of its acts under the joint resolution of Congress approved July the 5th, 1862, and the surrender to the United States of the said lands as railroad lands under section 5 of the said joint resolution and the subsequent selection by an agent appointed by the Governor of Michigan of the said land under the canal grant of July the 3rd, 1866, in order to satisfy the State's obligation to the canal company for the construction of said land, and the selection in like manner by the State of a like quantity of other lands in the place of the lands surrendered upon the originally located route for the benefit of the new line of road to the Wisconsin State line near the mouth of the Menominee river, which lands thus selected the State obtained from the United States and subsequently patented to the Chicago and Northwestern Railway Company for the construction of said new line of railroad to or near the mouth of the Menominee river would be precluded as against the canal company to set up that the State held title to the said lands embraced in said supplemental list No. 4, certified and approved as aforesaid, and the defendant cannot defeat
311 the plaintiff's title in this action by setting up that at the date of the selection of the lands in controversy under the canal grant of July the 3rd, 1866, and at the date of the approval of the said selection by the Secretary of the Interior, May 22nd, 1871, the title to the said land was in the State and not in the United States.

7. Even if, independent of the act of Congress approved the 2nd of March, 1889, entitled "An act to forfeit lands granted to the

State of Michigan to aid in the construction of a railroad from Marquette to Ontonagon, in said State," the plaintiff had no title to the land in controversy in this action, nevertheless the said act of March the 2nd, 1889, confirms the title of the plaintiff to the said land under supplemental list No. 4 of land selected by the State of Michigan under the act of Congress — the 3rd ——, 1866, and approved by the Secretary of the Interior May 22nd, 1871, as a portion of the lands to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, and entitles the plaintiff to recover in this action the possession of the land in controversy against the defendant.

The said circuit court refused to instruct the jury in accordance with any or either of the above requests, and to each of said rulings and refusals the said plaintiff's counsel then and there excepted.

And said plaintiff's counsel further requested the said circuit court to instruct the jury in the case of The Lake Superior Ship Canal, Railway and Iron Company against Walter Cunningham as follows:

7. Even if, independent of the act of Congress approved March the 2nd, 1889, entitled "An act to forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Mar-
312 quette to Ontonagon, in said State," the plaintiff had no title to the land in controversy in this action, nevertheless the said act of March the 2nd, 1889, confirms the title of the plaintiff to the said land under supplemental list No. 4 of lands selected by the State of Michigan under the act of Congress of July the 3rd, 1866, and approved by the Secretary of the Interior May 22nd, 1871, as a portion of the lands to aid in the construction of the harbor and ship canal at Portage Lake, Keweenaw Point, and entitles the plaintiff to recover in this action the possession of the land in controversy against the defendant unless the defendant had a *bona fide* pre-emption claim thereon on the 1st day of May, 1888, arising or asserted by actual occupation of said land under color of the laws of the United States.

8. The burden is on the defendant to prove that he had a *bona fide* pre-emption claim on the land in dispute on the 1st day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and the evidence produced by the defendant in this action in support thereof is insufficient to establish that he had on May 1st, 1888, such a pre-emption claim on the land in dispute as is provided for and confirmed by the last sentence of the third section of the said act of March the 2nd, 1889.

9. In order to bring the defendant's claim as a pre-emptor on the land in dispute on May 1st, 1888, within section 3 of the act of Congress approved March the 2nd, 1869, it is necessary that the said claims should, on the 1st day of May, 1888, have been a *bona fide* pre-emption claim arising or asserted by actual occupation of the land under color of the laws of the United States, and it is not such a claim if the defendant believed, as he has testified on this
313 trial, that at the time he settled upon and improved the said

land it was not then public land of the United States, but was part of a then unforfeited grant to the State of Michigan for the benefit of a railroad company.

10. The defendant, to establish his claim as a pre-emptor on the land in dispute on May 1st, 1888, introduced in evidence a declaratory statement containing an endorsement therein by the register and receiver of the land office as follows:

"*Declaratory Statement.*

I, Walter A. Cunningham, of the township of Iron River, Mich., being a citizen of the United States, and twenty-one years of age, have, on the twenty-fifth day of May, A. D. 1888, settled and improved the southwest quarter of sec. 25, town. 44 north of range 36 west, containing 160 acres, which land has not yet been offered at the reduced price and thus rendered subject to private entry; and I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of said act of 4th of Sep., 1841.

Given under my hand this 25th day of May, A. D. 1888.

WALTER A. CUNNINGHAM.

In presence of—
YOUNG CAMPBELL.

P. S.—I have lived with my family on the above land since the 28th day of March last. I enclose $2.00.

(Indorsement.)

U. S. LAND OFFICE,
MARQUETTE, MICH., *June* 4, 1888.

The within application, with the required fee tendered, was this day rejected, for the reason that the land applied for has been selected by and certified to the State of Michigan for the P. L. & L. S. S. C. Co., act July 3, 1866, list No. 4, approved May 22, 1871.

SAM'L E. BYRNE, *Register.*
M. H. MAYNARD, *Receiver.*"

314 This negatives and disproves the right of the defendant to claim in this suit that he had a pre-emption claim on the land on the 1st day of May, 1888.

11. The land in controversy having been certified and approved to the State of Michigan by the Secretary of the Interior on May 22nd, 1871, under the canal grant of July 3, 1866, and by the State disposed of to the canal company as part compensation for the construction of a canal, to the completion of which, according to law, the Governor of the State duly certified in 1875; the United States never having taken any steps to set aside the said certification and approval of the Secretary of the Interior of May 22, 1871; the State of Michigan having received under the joint resolution of July 5, 1862, to aid in the construction of the new line of railroad therein

mentioned from Marquette to the Wisconsin State line at or near the mouth of the Menominee river other lands in the place of all those which were embraced in the lists surrendered by the Governor to the United States under the said joint resolution of July 5, 1862 (which lists of surrendered lands embraced and described the land in controversy in this action), and the State having afterwards patented such other lands to the Chicago and Northwestern Railway Company as having been earned by the construction of the said new line of railroad; the State not having selected any other lands for the canal company than those approved May 22, 1871, as aforesaid, to the State under the canal grant or compensated the canal company for the construction of the said canal in any other way than by the lands selected for it under the act of July 3, 1866, and certified and approved to the State under such selections—such being the status of the lands in controversy on May 1, 1888,
315 the act of March 2, 1889, does not validate or confirm the defendant's claim thereon or thereto as a pre-emptor.

And said circuit court refused to instruct the jury in accordance with either or any of said requests, and to each of said refusals said plaintiff's counsel did then and there except.

And the said plaintiff's counsel further requested said circuit court to charge the jury in relation to said cause of The Lake Superior Ship Canal, Railway and Iron Company against Hugh Finan, as follows:

8. The defendant having testified on the trial, and it being a conceded fact in the case, that he did not settle upon or improve the land in controversy in this action or otherwise make a pre-emption claim thereon until after the 1st day of May, 1888, he is not within the provisions of the 3d section of the act of March 2, 1889, since that section of the said act only extends to a *bona fide* pre-emption claim on May 1st, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States.

9. As against the defendant the act of March 2, 1889, confirms the title and right of the plaintiff to the land in controversy under supplemental list No. 4, selected by the State of Michigan under the act of July 3, 1866, for the benefit of the canal company, which list was approved by the Secretary of the Interior May 22nd, 1871, and certified to the State of Michigan and entitles the plaintiff to a verdict in its favor for the recovery of the land in controversy from the defendant.

10. The land in controversy having been certified and approved to the State of Michigan by the Secretary of the Interior on May 22, 1871, under the canal grant of July 3, 1866, and by the State disposed of to the canal company as part compensation
316 for the construction of the canal, to the completion of which, according to law, the Governor of the State duly certified in 1875; the United States never having taken any steps to set aside the said certification and approval of the Secretary of the Interior of May 22, 1871; the State of Michigan having received under the said joint resolution of July 5, 1862, to aid in the construction of the new line of railroad therein mentioned from Marquette to the

Wisconsin State line at or near the mouth of the Menominee river other lands in the place of all those which were embraced in the lists surrendered by the Governor to the United States under the said joint resolution of July 5, 1862 (which lists of surrendered lands embraced and described the land in controversy in this action), and the State having afterwards patented such other lands to the Chicago and Northwestern Railway Company as having been earned by the construction of the said new line of railroad; the State not having selected any other lands for the canal company than those approved May 22, 1871, as aforesaid, to the State under the canal grant or compensated the canal company for the construction of the said canal in any other way than by the lands selected for it under the act of July 3, 1866, and certified and approved to the State under such selections—such being the status of the lands in controversy on May 1, 1888, the act of March 2, 1889, does not apply to defendant's case or validate or confirm the defendant's claim thereon or thereto as a pre-emptor.

But the said circuit court refused to instruct the jury in accordance with any or either of said requests, and to each of such refusals the said plaintiff's counsel did then and there except.

And thereupon the said circuit court, by the Hon. H. F. Severens, district judge, declared and delivered his opinion upon said causes as follows:

317 "In the Cunningham case it would be unprofitable to restate our own views upon the principal questions. The court is constrained by the obligations of judicial decorum to hold that the release of the title to the clear lands on the Ontonagon and State Line road, in which this tract was situated, executed by the Chicago and Northwestern Railway Company and by the Governor of the State of Michigan to the United States was unauthorized by law, and the selection of such lands for the canal company and the certification thereof by the Secretary of the Interior was void.

If this land was confirmed to the present canal company by the act of 1889, while it might relate back to the date of selection for some purposes, it would not do so for the purpose of maintaining an action brought in the meantime. To sustain the action of ejectment the plaintiff must have had title at the commencement of the suit, and if it had not then a title it cannot proceed upon a title subsequently perfected.

The verdict in that case must therefore be for the defendant.

In the Finan case the land, as in the Cunningham case, is in the clear limits of the Ontonagon and State Line Branch. The title stands in the same plight as in the Cunningham case; but the suit was commenced since the act of March 2, 1889, was passed, and it becomes necessary to decide whether the 3rd section of that act operated to confirm the title of the canal company to the land in question. If it were not for the express mention of the claims of the canal company in section 2, we should be prepared to hold, upon the liberal construction which should be given to statutes of this character, that the title of the plaintiff was confirmed by the provisions of section 3.

318 It is hard to understand why Congress should have excluded one party from the scope of the justice which it was endeavoring to secure to those who had purchased the forfeited lands for value under color of lawful authority, supposing they were acquiring a valid title, and have laid the scourge upon that one.

But it is a question of construction, and my brother Sage is of opinion that the specific mention of the canal company's claims in section 2 brings the subject under the rule which excludes the particular matter from the operation of the general provision, and while I have serious doubt whether the claim of the canal company in respect to these lands is so specifically dealt with and disposed of by the 2nd section as to exclude it from the equity generally accorded by section 3 to all persons coming within the conditions there mentioned, I shall, with considerable hesitation, however, concur in his construction.

This conclusion leaves this case exposed to the opinion of the circuit judge in the Cunningham case, and there must be a verdict for the defendant in this case also."

And the opinion of the court so pronounced by the Hon. H. F. Severens was supplemented by Hon. George R. Sage as follows:

"I don't know that it is necessary for me to add anything to the statement of my brother Severens.

This act of March 2, 1889, contains provisions which are incongruous and difficult of construction, and I have hesitated to express an opinion at all in conflict with that to which my brother was inclined and rather preferred to defer to his opinion and let the ruling of the court be accordingly, but as he prefers otherwise so it is.

319 I am not able myself to see how it is possible to give the effect to the provisions of the third section which would confirm the title of the canal company without thereby setting aside altogether the provisions of the second section, and that, as I understand it, would be in conflict with the rule of construction applicable to such cases as this, where there is a particular provision relating to one party with whom the law deals, and a general provision relating to all or to all excepting that party or to all apparently, and they are in conflict. I understand that the particular provision must prevail; that is the duty of the court, as it is in constructing a contract, to take up the act in its entirety and so construe its provisions as to make it effective, and I am not myself able to see how that can be done in this instance and treat the third section as confirming the title of the canal company. I don't understand that this act was intended in any sense, however, to be hostile or adverse to the canal company. Perhaps what Congress intended would have been more exactly and fully expressed and provided for if it had given to the canal company the right to bring suit against the United States for a confirmation of its title or to quiet its title.

In the case of the Newport & Cincinnati bridge, which the company proposed to construct at the height of 78 feet above low-water mark, Congress interposed before the superstructure was placed upon the piers and by special act required that the bridge be constructed

at the height of 100 feet above low-water mark, but in the same act it provided that the company should have the right to file its bill against the United States for the equitable relief which, upon the facts and circumstances, it might be entitled to.

320 I understand in this case that Congress intended to leave this company and the Ontonagon Company, as to its claims for land which it had selected and as to its contests with those who are holding adversely or claiming adversely to it, without being affected one way or the other by this act, leave it exactly where they found it, and it is upon that view that I think the third section does not confirm the title of the canal company."

And thereupon the said circuit court instructed the jury as follows:

"GENTLEMEN OF THE JURY: These several cases resolve themselves into questions of law, and there remains no question of fact to be decided by the jury. The ruling of the court upon matters of law involved has disposed of the whole subject-matter of the controversy in the several cases. Nevertheless, the jury being here, it is necessary to take a formal verdict.

The court instructs you that upon the law of this case, speaking now of the Cunningham case, your verdict should be for the defendant.

* * * * * * *

In regard to the Finan case your verdict should be for the defendant. The clerk will take the verdict in the several cases."

Plaintiff's counsel then and there excepted to the said instructions of the court directing the jury to render a verdict in favor of the defendant in the case of said plaintiff against Walter A. Cunningham, and also excepted to the ruling of the court directing a verdict in favor of the defendant in the case of said plaintiff against Hugh Finan.

321 Thereupon, under the instruction of the court as aforesaid, the said jury immediately returned a verdict against the plaintiff and in favor of the said defendant, Walter A. Cunningham, and also returned a verdict against the said plaintiff and in favor of the said defendant, Hugh Finan.

And because none of the exceptions so made appear on the record of said trial, on the request of said plaintiff's counsel the said district judge of the western district of Michigan, who presided at said trial, has settled and signed this bill of exceptions this thirtieth day of September, A. D. 1890.

(Signed) H. F. SEVERENS,
*District Judge.*

Filed Sept. 30th, 1890.

F. M. MOORE, *Dep. Clerk.*

322. UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

WESTERN DISTRICT OF MICHIGAN, *ss:*

I, Charles L. Fitch, clerk of said court, do hereby certify that the annexed and foregoing is a true transcript of the records and files of the cause therein entitled; that I have compared the same with the original record and files remaining in my office, and it is a true transcript thereof and of the whole of such originals.

The original writ of error, citation, and assignment of errors are also hereto annexed.

Seal of the U. S. Circuit Court, Western District of Mich., Northern Division.

In witness whereof I have hereunto set my hand and affixed the seal of said court this thirtieth day of September, in the year one thousand eight hundred and ninety.

CHARLES L. FITCH, *Clerk*,
By F. M. MOORE, *Deputy Clerk*.

323 (*Petition for Writ of Error.*)

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Northern Division of the Western District of Michigan.

LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON —, Plaintiff,
*vs.*
WALTER A. CUNNINGHAM, Defendant.

To the honorable Henry F. Severens, judge of the circuit court of the United States for the said district:

Now comes The Lake Superior Ship Canal, Railway and Iron Company, plaintiff, by Ball & Hanscom, its attorneys, and complains in the record and proceedings and also in the rendition of judgment in a suit between The Lake Superior Ship Canal, Railway and Iron Company, plaintiff, and Walter A. Cunningham, defendant, in a plea of ejectment, tried in the circuit court of the United States for said northern division of the western district of Michigan, at the May term thereof, A. D. 1890, and in which judgment was rendered against the said plaintiff and in favor of the said defendant on the twenty-sixth day of July, A. D. 1890, manifest error hath intervened, to the great damage of the said plaintiff; wherefore said plaintiff prays a writ of error and such other process as may cause the same to be corrected by the Supreme Court.

Marquette, September 27, A. D. 1890.

BALL & HANSCOM,
*Attorneys for Plaintiff.*

[Endorsed:] The circuit court of the United States for the northern division of the western district of Michigan. The Lake Superior Ship Canal, Railway and Iron Company, plaintiff, *vs.* Walter A. Cunningham, defendant. Petition for writ of error. Filed Sept. 30, 1890. F. M. Moore, dep. clerk. Ball & Hanscom, att'ys for plaintiff below.

324 (*Bond.*)

UNITED STATES OF AMERICA:

The Supreme Court.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Plaintiff,
*vs.*
WALTER A. CUNNINGHAM, Defendant.

Know all men by these presents that we, The Lake Superior Ship Canal, Railway and Iron Company of the State of Michigan, as principal, and John M. Longyear and Dan. H. Ball, as sureties, are held and firmly bound unto the above-named defendant in the sum of five hundred dollars, to be paid to the said defendant, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this thirtieth day of September, A. D. 1890.

Whereas the above-named plaintiff has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment in the above-entitled action rendered by the circuit court of the United States for the northern division of the western district of Michigan:

325 Now, therefore, the condition of this obligation is such that if the above-named Lake Superior Ship Canal, Railway and Iron Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

LAKE SUPERIOR SHIP CANAL,
RAILWAY & IRON COMPANY.
J. M. LONGYEAR, *Agent.* [SEAL.]
J. M. LONGYEAR. [SEAL.]
DAN. H. BALL. [SEAL.]

UNITED STATES OF AMERICA,
*Western District of Michigan,* } *ss:*

Dan. H. Ball and John M. Longyear, of said district, being duly

sworn, do depose and say each for himself that he is worth the sum of one thousand dollars over and above all just debts and liabilities.

J. M. LONGYEAR.
DAN. H. BALL.

Subscribed and sworn to before me this 30th day of September, A. D. 1890.

E. A. SHERMAN,
*Notary Public, Marquette Co., Mich.*

I approve of the above bond and the sufficiency of the sureties thereto.

Dated September 30th, A. D. 1890.

H. F. SEVERENS,
*District Judge.*

[Endorsed:] United States of America. The Supreme Court. Lake Superior Ship Canal, Railway and Iron Company, plaintiff, *vs.* Walter A. Cunningham, defendant. Bond. Filed Sept. 30, 1890. F. M. Moore, dep. clerk. Dan. H. Ball, att'y for plaintiff in error.

326 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the circuit court of the United States for the Northern division of the western district of Michigan, Greeting:

Because in the record and proceedings and also in the rendition of judgment of a plea which is in the said circuit court, before you, Honorable Henry F. Severens and Honorable George R. Sage, district judges, sitting in the circuit court, between The Lake Superior Ship Canal, Railway and Iron Company, a corporation of the State of Michigan, plaintiff, and Walter A. Cunningham, defendant, in a plea of ejectment, manifest error hath happened, to the great damage of the plaintiff, as by its complaint appears, we, being willing that error, if any hath been made, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

327 Witness the Honorable Melville W. Fuller, Chief Justice of

the said Supreme Court, the thirtieth day of September, in the year of our Lord one thousand eight hundred and ninety.

{ Seal of the U. S. Circuit Court, Western District of Mich., Northern Division. }

CHARLES L. FITCH,
*Clerk of the Circuit Court of the United States for the Northern Division of the Western District of Michigan,*
By FRANCIS M. MOORE,
*Deputy Clerk.*

DAN. H. BALL,
*Attorney for Plaintiff in Error.*
JOHN F. DILLON, *Of Counsel.*

Allowed Sept. 30, 1890.
H. F. SEVERENS,
*District Judge.*

WESTERN DISTRICT OF MICHIGAN, *ss:*

To the justices of the Supreme Court of the United States:

The return to this writ appears by the schedules thereunto annexed.

The answer of the judges of the circuit court of the United States for the western district of Michigan.

{ Seal of the U. S. Circuit Court, Western District of Mich., Northern Division. }

CHARLES L. FITCH,
*Clerk of said Court,*
By FRANCIS M. MOORE,
*Deputy Clerk.*

328 [Endorsed:] Supreme Court of U. S. Lake Superior Ship Canal, Railway & Iron Co., pl't'ff, *vs.* Walter A. Cunningham, def'd't. Writ of error. Writ of error. Filed Sept. 30th, 1890. F. M. Moore, dep. clerk. Dan. H. Ball, attorney for pl't'ff in error.

329 UNITED STATES OF AMERICA, *ss:*

To Walter A. Cunningham, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington on the second Monday of October, A. D. 1890, pursuant to the writ of error filed in the clerk's office of the circuit court of the United States for the sixth circuit and northern division of the western district of Michigan, wherein The Lake Superior Ship Canal, Railway and Iron Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry F. Severens, district judge, acting

as presiding judge of the said circuit court of the United States for said district this thirtieth day of September, in the year of our Lord one thousand eight hundred and ninety.

H. F. SEVERENS,
*District Judge.*

Due service of the foregoing citation is hereby acknowledged. September 30th, 1890.

WOSPER BROS.,
*Attorneys for Def't Below.*

330 [Endorsed :] Supreme C't of the U. S. Lake Superior Ship Canal, Railway and Iron Co., pl't'ff, *vs.* Walter A. Cunningham, d'f'd't. Citation. Filed Sept. 30, 1890. F. M. Moore, dep. clerk. Dan. H. Ball, att'y for pl't'ff in error.

331 UNITED STATES OF AMERICA:

The Supreme Court.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Plaintiff in Error,
*vs.*
WALTER A. CUNNINGHAM, Defendant in Error. } In Error.

Of the October term, in the year of our Lord one thousand eight hundred and ninety.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Lake Superior Ship Canal, Railway and Iron Company, by Dan. H. Ball, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. In admitting in evidence the order of the Governor of Michigan, dated October 4, 1867, to issue a commission to Perez J. Avery for the selection of lands under the act of Congress granting lands to the State of Michigan to aid in the construction of the harbor and ship canal at Portage Lake, approved July 3, 1866.

2. In admitting in evidence the letter of the Commissioner of the General Land Office, dated December 3, 1857, to P. H. Smith in reference to the map of definite location of the line of route of the Chicago, St. Paul and Fond du Lac railroad from Ontonagon to the State line.

3. In admitting evidence of the acceptance of the line of said railroad from Ontonagon to the State line by the Secretary of the Interior.

332 4. In admitting in evidence the map of survey of said railroad line from Marquette and Ontonagon to the State line.

5. In admitting in evidence a list of lands certified by the Commissioner of the General Land Office and approved by the Secretary

of the Interior as inuring to the State of Michigan to aid in the construction of a railroad from Marquette to the State line.

6. In admitting in evidence a list of lands certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior as inuring to the State of Michigan to aid in the construction of a railroad from Ontonagon to the State line, under act of June 3, 1856.

7. In admiting in evidence a list of lands certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior as inuring to the State of Michigan to aid in the construction of said roads from Ontonagon and Marquette to the State line and situated within the six-miles limits of said two lines of roads where they intersect and cross each other.

8. In admitting in evidence the order of the Commissioner of the General Land Office, dated May 29, 1873, for the restoration of certain lands to market and the countermand of said order by telegraph, dated July 30, 1873.

9. In admitting in evidence the report of the Secretary of the Interior to the House of Representatives, dated March 11, 1878.

10. In admitting evidence of the presentation of pre-emption claim of defendant Walter A. Cunningham at the local land office for the land involved in this suit.

333 11. In admitting in evidence the second application made by said Walter A. Cunningham to select said lands as a pre-emption, dated April 27, 1889.

12. In admitting evidence of improvements made by the said Cunningham upon the lands in controversy as a pre-emptor.

13. In admitting in evidence the letter of the deputy State land commissioner of the State of Michigan, dated May 14, 1890.

14. In admitting evidence to show that the plaintiff in this case or the corporations from which it claims title to the lands in question never constructed or operated any railroad under its charter.

15. In excluding the files and records of said court in the case formerly pending therein in equity between The Lake Superior Ship Canal, Railway and Iron Company, complainant, and The Ontonagon and Brule River Railroad Company, defendant.

16. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "That on the pleadings and evidence in this action the plaintiff is entitled to recover, and you will find a verdict in its favor."

17. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "The plaintiff claims title and right to recover the possession of the real estate in controversy under the act of Congress of July the 3rd, 1866, entitled 'An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State,' and under a certification of the said land to the State of Michigan for the benefit of the Portage Lake and Lake Superior Ship Canal Company by the Commissioner of the General
334 Land Office, dated May 19th, 1871, being supplemental list No. 4, approved as follows:

'DEPARTMENT OF THE INTERIOR,
WASHINGTON CITY, D. C., 22*d May*, 1871.
Approved, subject to the conditions and rights above mentioned.
C. DELANO, *Secretary.*'

The court instructs the jury that inasmuch as the land in question in this suit is embraced in said certification thus approved the same operated to convey the said land to the State of Michigan, and under the said act the said land thus certified inured to the use and benefit of the Portage Lake and Lake Superior Ship Canal Company, whose name was afterwards changed to that of the Lake Superior Ship Canal, Railroad and Iron Company, and as the Governor of the said State, on the 25th day of June, 1875, certified and determined that the said ship canal and harbor mentioned in said act of July 3rd, 1866, and in the Michigan act of March 18th, 1865, entitled 'An act to accept a grant of lands by Congress to aid in the construction of the ship canal and harbor at the head of Portage Lake at its connection with Lake Superior, and to provide for the construction of the same,' and the act of the Michigan Legislature of March 27th, 1867, accepting the said grant made by the said act of Congress of July the 3rd, 1866, had been constructed by said company as required by law, and as the plaintiff in this suit has shown that it has succeeded to the title and rights of the said Portage Lake and Lake Superior Ship Canal Company in and to the said land, the plaintiff is entitled to recover the possession thereof in this action from the defendant, and you will accordingly find a verdict for the plaintiff."

18. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "The supplemental list No. 4 of the
335 said lands introduced in evidence, embracing, among other tracts, the land in question, approved by the Secretary of the Interior on the 22nd day of May, 1871, was as against the said defendant a valid certification of the said lands, and the defendant in this action of ejectment cannot defeat the title and right thus granted to and conferred on the State of Michigan, and through it to the said canal company, by showing that the said lands were improperly selected, certified, and approved to the State of Michigan as aforesaid."

19. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "Under the said act of Congress of July 3rd, 1866, the grant of lands for the benefit of the said ship canal company was of two hundred thousand acres of land in the Upper Peninsula of the State of Michigan, to be selected from lands to which the right of pre-emption or homestead had not attached, which selection was to be made by an agent or agents appointed by the Governor of the said State, subject to the approval of the Secretary of the Interior, which when so selected should inure to the use and benefit of the said ship canal company in accordance with an act of the Legislature of the State of Michigan conferring the lands granted to the said State on the said company under this legislation. It is in proof that the land in question in this suit was selected to fill the said canal grant of July the 3rd, 1866, by an agent appointed by

the State of Michigan, and that the said selection was approved by the Secretary of the Interior on the 22nd day of May, 1871, and the list containing the said land and the said approval were duly certified to the State of Michigan for the benefit of the said canal company. This act of July 3rd, 1866, conferred upon the Secretary of the Interior the power to determine what lands were of
336 the description granted by the act of July the 3rd, 1866, and that decision, as embodied in the said list embracing the land now in controversy and approved by the Secretary of the Interior and accordingly certified to the State of Michigan, is conclusive in this action of the rightfulness of the said certification and had the effect in law to place the title to the lands thus approved and certified to the State of Michigan in the State of Michigan for the benefit of the said canal company."

20. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "It appearing that, under the joint resolution of Congress of July the 5th, 1862, entitled 'A joint resolution relative to a certain land grant for railroad purposes made to the State of Michigan in 1856,' the Chicago and Northwestern Railway Company (the successor in interest of the Ontonagon and State Line Railroad Company and of the Marquette and State Line Railroad Company, consolidated into the Chicago, St. Paul and Fond du Lac Railroad Company, and the successor in interest of the Chicago, St. Paul and Fond du Lac Railroad Company and of the Peninsula Railroad Company), by instrument dated the fourteenth day of June, 1870, remised, released, and quitclaimed to the said State of Michigan and its assigns all the right, title, and interest it then had or ever had in and to the lands in controversy, and that afterwards, to wit, on the 14th day of August, 1870, the Governor of the State of Michigan, under the great seal thereof, filed in the General Land Office, at Washington, the lists of the said railroad lands, including the land in controversy in the present action, which had been theretofore selected and certified under the act of Congress of June 3rd, 1856, entitled 'An act making a grant of alternate sections of the public land in the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes,' together with a certificate
337 under the seal of the State; that the State and its assigns surrendered all claim to the said lands set forth and described in the lists thereof, which included the land in controversy in this action, and that the same had never been pledged, sold, or otherwise incumbered; and it further appearing that under the said joint resolution of July the 5th, 1862, the State afterwards selected for the new line of railroad mentioned in the said joint resolution of July the 5th lands in quantity greater than the lands thus surrendered, and that the lands so selected were afterwards certified by the United States to the State of Michigan for such new line, and were afterwards patented by the said State of Michigan to the said Chicago and Northwestern Railway Company, the court instructs you that said lands thus relinquished and surrendered by the Governor, having afterwards been selected under the canal grant of July 3rd, 1866, by an agent appointed by the Governor and afterwards approved by

the Secretary of the Interior and certified to the State of Michigan for the benefit of the said canal company, such certification thereof by the Secretary of the Interior was not void."

21. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "Said supplemental list No. 4 of lands selected by the State of Michigan, under the act of Congress of July the 3rd, 1866, which was approved May 22nd, 1871, by the Secretary of the Interior, as a portion of the land to aid in the construction of the harbor and ship canal at Portage Lake, Keweenaw Point, to the State for the benefit of the canal company under said act of July 3rd, 1866, is not void on the ground that the title to the said lands thus selected (which included, among other tracts, the one in controversy in this action) was in the State of Michigan under the railroad act of June the 3rd, 1856, for the State by reason of its acts under the joint resolution of Congress approved July the 5th, 1862,
338 and the surrender to the United States of the said lands as railroad land under section 5 of the said joint resolution, and the subsequent selection by an agent appointed by the Governor of Michigan of the said land under the canal grant of July the 3rd, 1866, in order to satisfy the State's obligation to the canal company for the construction of said canal, and the selection in like manner by the State of a like quantity of other lands in the place of the lands surrendered upon the originally located route for the benefit of the new line of road to the Wisconsin State line near the mouth of the Menominee river, which lands thus selected the State obtained from the United States and subsequently patented to the Chicago and Northwestern Railway Company for the construction of the said new line of railroad to or near the mouth of the Menominee river, would be precluded as against the canal company to set up that the State held title to the said lands embraced in said supplemental list No. 4, certified and approved as aforesaid, and the defendant cannot defeat the plaintiff's title in this action by setting up that at the date of the selection of the lands in controversy under the canal grant of July the 3rd, 1866, and at the date of the approval of the said selection by the Secretary of the Interior, May 22nd, 1871, the title to the said land was in the State and not in the United States."

22. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "Even if, independent of the act of Congress approved the 2nd of March, 1889, entitled 'An act to forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Marquette to Ontonagon, in said State,' the plaintiff had no title to the land in controversy in this action, nevertheless
339 the said act of March the 2nd, 1889, confirms the title of the plaintiff to the said land under supplemental list No. 4 of lands selected by the State of Michigan under the act of Congress of July the 3rd, 1866, and approved by the Secretary of the Interior May 22nd, 1871, as a portion of the lands to aid in the construction of the harbor and ship canal at Portage Lake, Keweenaw Point, and entitles the plaintiff to recover in this action the possession of the land in controversy against the defendant."

23. In refusing to instruct the jury, on request of plaintiff's coun-

sel, as follows: "Even if, independent of the act of Congress approved March the 2nd, 1889, entitled 'An act to forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Marquette to Ontonagon, in said State,' the plaintiff had no title to the land in controversy in this action, nevertheless the said act of March the 2nd, 1889, confirms the title of the plaintiff to the said land under supplemental list No. 4 of lands selected by the State of Michigan under the act of Congress of July the 3rd, 1866, and approved by the Secretary of the Interior May 22nd, 1871, as a portion of the lands to aid in the construction of the harbor and ship canal to Portage Lake, Keweenaw Point, and entitles the plaintiff to recover in this action the possession of the land in controversy against the defendant, unless the defendant had a *bona fide* pre-emption claim thereon on the 1st day of May, 1888, arising or asserting by actual occupation of said land under color of the laws of the United States."

24. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "The burden is on the defendant to prove that he had a *bona fide* pre-emption claim on the land in dispute on the 1st day of May, 1888, arising or asserted by actual occupation
340 of the land under color of the laws of the United States, and the evidence produced by the defendant in this action in support thereof is insufficient to establish that he had on May 1st, 1888, such a pre-emption claim on the land in dispute as is provided for and confirmed by the last sentence of the third section of the said act of March the 2nd, 1889."

25. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "In order to bring the defendant's claim as a pre-emptor on the land in dispute on May 1st, 1888, within section 3 of the act of Congress approved March the 2nd, 1889, it is necessary that the said claim should, on the 1st of May, 1888, have been a *bona fide* pre-emption claim, arising or asserted by actual occupation of the land under color of the laws of the United States, and it is not such a claim if the defendant believed, as he has testified on this trial, that at the time he settled upon and improved the said land it was not then public land of the United States, but was part of a then unforfeited grant to the State of Michigan for the benefit of a railroad company."

26. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "The defendant, to establish his claim as a pre-emptor on the land in dispute on May 1st, 1888, introduced in evidence a declaratory statement containing an endorsement thereon by the register and receiver of the land office as follows:

'*Declaratory Statement.*

I, Walter A. Cunningham, of the township of Iron River, Mich., being a citizen of the United States and twenty-one years of age, have on the 25th day of May, A. D. 1888, settled and improved the southwest quarter of sec. 25, town. 44 north, of range 36 west, containing 160 acres, which land has not yet been offered at the re-

duced price and thus rendered subject to private entry; and
341 I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of said act of 4th of Sep., 1841.

Given under my hand this 25th day of May, A. D. 1888.

WALTER A. CUNNINGHAM.

In presence of—
YOUNG CAMPBELL.

P. S.—I have lived with my family on the above land since the 28th day of March last. I inclose $2.00.

(Indorsement.)

U. S. LAND OFFICE,
MARQUETTE, MICH., *June* 4, 1888.

The within application, with the required fee tendered, was this day rejected for the reason that the land applied for has been selected by and certified to the State of Michigan for the P. L. & L. S. S. C. Co., act July 3, 1866. List No. 4, approved May 22, 1871.

SAM'L E. BYRNE, *Register.*
M. H. MAYNARD, *Receiver.*'

This negatives and disproves the right of the defendant to claim in this suit that he had a pre-emption claim on the land on the 1st day of May, 1888."

27. In refusing to instruct the jury, on request of plaintiff's counsel, as follows: "The land in controversy having been certified and approved to the State of Michigan by the Secretary of the Interior on May 22nd, 1871, under the canal grant of July 3, 1866, and by the State disposed of to the canal company as part compensation for the construction of a canal, to the completion of which according to law the Governor of the State duly certified in 1875, the United States never having taken any steps to set aside the said certification and approval of the Secretary of the Interior of May 22,
342 1871, the State of Michigan having received, under the joint resolution of July 5, 1862, to aid in the construction of the new line of railroad therein mentioned from Marquette to the Wisconsin State line at or near the mouth of the Menominee river, other lands in the place of all those which were embraced in the lists surrendered by the Governor to the United States under the said joint resolution of July 5, 1862 (which lists of surrendered lands embraced and described the land in controversy in this action), and the State having afterwards patented such other lands to the Chicago and Northwestern Railway Company as having been earned by the construction of the said new line of railroad, the State not having selected any other lands for the canal company than those approved May 22, 1871, as aforesaid, to the State under the canal grant or compensated the canal company for the construction of the said canal in any other way than by the lands selected for it under the act

of July 3, 1866, and certified and approved to the State under such selections; such being the status of the lands in controversy on May 1, 1888, the act of March 2, 1889, does not validate or confirm the defendant's claim thereon or thereto as a pre-emptor.

28. In ruling and declaring the opinion of the court that the "release of the title to the clear lands on the Ontonagon and State Line road, in which this tract (the southwest quarter of section twenty-five (25), in township forty-four (44) north of range thirty-six (36) west) was situated, executed by the Chicago and Northwestern Railway Company and by the Governor of the State of Michigan to the United States, was unathorized by law, and the selection of such lands for the canal company and the certification thereof by the Secretary of the Interior was void."

29. In ruling and delivering the opinion of the court that the provision in the act of Congress of March 2, 1889, confirming
343 certain entries and State selections of land, would not relate back to the time when this action was brought for the purpose of maintaining this action.

30. In ruling that the provision of said act of March 2, 1889, did not operate to confirm selections and certifications of land to the State of Michigan to aid in the construction of the canal and harbor at Portage Lake under the act of Congress approved July 3, 1866.

31. In instructing the jury as follows: "The court instructs you that upon the law of this case, speaking now of the Cunningham case, your verdict should be for the defendant."

32. There is also error, in this, that by the record aforesaid it appears that the judgment aforesaid was given for the said defendant against the said plaintiff, whereas by the law of the land the said judgment ought to have been given for the said plaintiff and against the said defendant; and the said plaintiff prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things that it has lost by occasion of the said judgment, etc.

DAN. H. BALL,
IRVING D. HANSCOM,
*Attorneys for Plaintiff in Error.*
JOHN F. DILLON, *Of Counsel.*

344 UNITED STATES OF AMERICA:

The Supreme Court.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Plaintiff in Error,
*vs.*
WALTER A. CUNNINGHAM, Defendant in Error.

Whereas the clerk of the circuit court of the United States for the northern division of the western district of Michigan in making return to the writ of error in this cause inadvertently omitted to attach thereto and embody in said return a transcript of the entry of the final judgment therein, and has since making return to said writ of

error transmitted to the clerk of this court a transcript of said judgment entry certified by him:

Therefore it is hereby stipulated by and between the parties hereto that the transcript of judgment entry so certified by said clerk may be attached to his return to the writ of error in this cause or filed therewith as an addition to the record and be made a part of the record of said cause with the same effect as if the same had been originally attached to and transmitted with said writ of error and return.

Dated this 7th day of November, A. D. 1890.

DAN. H. BALL,
*Attorney for Pl'ff in Error.*
DON M. DICKINSON,
*Attorney for Def't in Error.*

[Endorsed:] United State- of America. Supreme Court. Lake Superior Ship Canal, Railway and Iron Company, p'lff in error, *vs.* W— A. Cunningham, def't in error. S-ulation.

345 At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, continued and held at the United States court-rooms, in the city of Marquette, in said district and division, on Saturday, the twenty-seventh day of September, A. D. one thousand eight hundred and ninety, and of the year of Independence the one hundred and fifteenth.

Present: Hon. Henry F. Severens, district judge.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY *vs.* WALTER CUNNINGHAM. } In Ejectment.

The jury by whom the issue in this cause was tried having rendered a verdict in favor of the defendant and against the plaintiff, therefore it is considered that the said plaintiff take nothing by its suit, and that the said defendant do go thereof without day; and it is further considered that the said defendant do recover against the said plaintiff his costs and charges by him about his defense in this behalf expended, to be taxed, and that the said defendant have execution thereof.

346 WESTERN DISTRICT OF MICHIGAN, *Northern Division,* } *ss:*

I, Charles L. Fitch, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, do hereby certify the annexed and foregoing to be a true and correct copy of the record of the judgment entered in the cause therein entitled; that I have compared the same with the original record of said judgment now remaining of record in my office; that it is a true and correct copy thereof and of the whole thereof.

Seal of the U. S. Circuit Court, Western District of Mich., Northern Division.

In witness whereof I have hereunto set my hand and affixed the official seal of said court, at the city of Marquette, in said district and division, this 30th day of September, A. D. one thousand eight hundred and ninety.

CHAS. L. FITCH, *Clerk*,
By F. M. MOORE,
*Deputy Clerk.*

[Endorsed:] 1486. The circuit court of the United States for the nor. div. of western district of Michigan. The Lake Superior Ship —, Railway & — Company *vs.* — Cunningham. Certified copy of — of judgment.

[Endorsed:] Supreme Court U. S. 1890, October term. No. 1486. The Lake Superior Ship Canal, Railway & Iron Co., pl'ff in error, *vs.* Walter A. Cunningham. Stipulation and addition to record. Filed Nov. 11, 1890.

Endorsed on cover: W. Michigan C. C. U. S. No. 1486. The Lake Superior Ship Canal, Railway & Iron Company, plaintiff in error, *vs.* Walter A. Cunningham. Filed October 20, 1890.

The Supreme Court of the United States.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY,
Plaintiff in Error,
*vs.*
HUGH FINAN, Defendant in Error.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY,
Plaintiff in Error,
*vs.*
WALTER A. CUNNINGHAM, Defendant in Error.

It is hereby stipulated and agreed by the parties to this cause that the "supplemental list No. 4 of lands selected by the agent of the State of Michigan," as applicable to the grant of lands to the State of Michigan, being act of Congress approved July 3, 1866, being the first document introduced in evidence on the trial of said causes, a copy of which appears on pages 82 and 83 of the original record on file in this court of the cause secondly above mentioned, contained, among other lands, the east half of section thirteen (13), in township forty-four (44) north, of range thirty-six (36) west, embracing the land involved in the cause firstly above entitled; that in drafting and settling the bill of exceptions in said causes said east half of section thirteen (13), by clerical error, was accidentally omitted from said copies so introduced as stated in said bills of exceptions.

And it is further stipulated that said bills of exceptions may be amended by inserting in the copy — said supplemental list No. 4, as set forth therein, the above description of land, so that the tabulated descriptions of land set forth in said bills of exceptions shall read as follows:

| Parts of section. | Section. | Town. | Range. | Acres. |
|---|---|---|---|---|
| E ½ of | 13 | 44 | 36 | |
| E ½ of N. W. ¼ | " | " | " | |
| S. W. ¼ of N. W. ¼ | " | " | " | 600.00 |
| S. W. ¼ | " | " | " | |
| All of | 25 | " | " | 640.00 |

And that such amendment when so made may be made a part of the record in this cause, with the same effect as if the same had been originally incorporated into said bills of exceptions.

Dated March 15, A. D. 1894.

JOHN F. DILLON,
DAN. H. BALL,
*Attorneys for Plaintiff in Error.*
DON M. DICKINSON,
*Attorney for Defendants in Error.*

[Endorsed:] Lake Sup. Ship Canal R'y & Iron Co., pl'ff in error, *vs.* Hugh Finan, Walter A. Cunningham.

[Endorsed:] Case No. 14,351 & 14,352. Supreme Court U. S. October term, 1893. Term No., 305 & 306. The Lake Superior Ship Canal, R'y & Iron Co., P. E., *vs.* Walter A. Cunningham and same *vs.* Hugh Finan. Stipulation to amend bill of exceptions. Filed April 6, 1894.